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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 45

UNITED STATES OF AMERICA,
Petitioner,
—v.—
RICHARD G. AUGENBLICK

UNITED STATES OF AMERICA,
Petitioner,
—v.—
KENNETH N. JUHL

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 7, 1968
CERTIORARI GRANTED APRIL 29, 1968

Supreme Court of the United States

OCTOBER TERM, 1968

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UNITED STATES v. AUGENBLICK

RELEVANT DOCKET ENTRIES

Petition	Filed October 22, 1964
Defendant's Answer	Filed February 19, 1965
Opinion	Filed May 12, 1967
Order Denying Motion for Reconsideration	Filed November 9, 1967

* * * *

Filed, Oct. 22, 1964, Court of Claims

PETITION

(Filed October 22, 1964)

To the Honorable Judges of the
United States Court of Claims

1. The petitioner, on February 10, 1961, was a Commander in the U. S. Navy, with eighteen years service. He had served with distinction; this service included combat service in World War II and the Korean War, membership in the Naval War College, service as an Executive Officer of a destroyer and an LSD and the Commanding Officer of a destroyer, duty in the Office of the Secretary of Defense and in the Strategic Plans Division of the Office of Chief of Naval Operations. He had been selected for promotion to Captain. Until February 10, 1961, his record was without blemish.

2. On February 10, 1961, the petitioner was placed under pre-trial investigation of a violation of Article 125, Uniform Code of Military Justice (sodomy), with the specification that on or about January 12 he did commit sodomy with a named airman. This charge and any misconduct associated with it was at all times and is denied by the petitioner and he was, in fact, eventually found

not guilty of this charge although eventually found guilty of a different lesser, charge.

3. Over objection that this grave charge, which imperiled an entire career, livelihood and life's reputation, should not go to trial without petitioner confronting his accuser, this charge was referred to trial without petitioner being permitted to confront and examine the alleged eyewitnesses to the alleged offense, two civilian policemen. This recommendation (by the Investigating Officer) that the charge proceed to trial without a confrontation between the accused and the accusers was based in substantial part on the pre-trial testimony by a civilian employee of Naval Intelligence, Agent Mendelson, stating that he had received sworn statements from the two civilian policemen incriminating the petitioner. Prior to arraignment, the foregoing objection was repeated and again petitioner was denied the right to confront his accusers. Petitioner was then arraigned, pleaded not guilty and trial before a General Court-Martial commenced at the U. S. Naval Station, Washington, D. C., on May 1, 1961. Only then, after other testimony had been taken, but prior to the receipt of testimony of one of the supposed eyewitnesses, was petitioner given an opportunity, in an interview during Court recess, to question this accusing policeman. It then developed that this accuser's pretrial statement had never, in fact, been sworn. An out-of-court hearing was then called and it was established from the testimony of the policeman himself that his pretrial statement had not been sworn although Agent Mendelson had testified, under oath, that it had. Petitioner, through counsel, then moved for dismissal of the charge against him on grounds that the pretrial proceeding had been defective, the recommendation for trial defective and the proceeding thereafter a nullity. The law officer concurred that further proceedings would result in a nullity.

4. Rule 5(c) of the Federal Rules of Criminal Procedure provides as follows:

> ". . . (c) *Preliminary examination* . . . The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf."

Article 32 of the Uniform Code of Military Justice provides:

> "(a) No charge or specification shall be referred to the General Court-Martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, and the disposition which should be made of the case in the interest of justice and discipline.
>
> "(b) The accused shall be advised of the charges against him and of his right to be represented at such investigation by counsel . . . . At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or litigation, and the investigating officer shall examine available witnesses requested by the accused . . . .
>
> "(c) If an investigation of the subject matter of an offense has been conducted prior to the time the accused is charged with the offense and the accused was present at such investigation and afforded the opportunities for representation prescribed in subdivision (b) of this Article, no further investigation of that charge is necessary under this Article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitled the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf."

5. The law officer proceeded, however, to ignore Petitioner's Motion to Dismiss. Nor did he order a mistrial. Instead, he "considered" this motion to be a "Motion for Appropriate Relief," terminated the trial, adjourned the court, and referred the matter back to the Convening Authority for whatever disposition that Authority deemed appropriate. No such "Motion for Appropriate Relief" had been made by petitioner. This action was taken after

petitioner had been put in jeopardy: the General Court-Martial had commenced and evidence had been received on the general issue. On May 12, 1961, without the consent and over the protest of the petitioner, the matter was sent by the Convening Authority to a Court of Inquiry. On August 16, 1961, again without the request, consent or knowledge of the petitioner, the matter was sent to a newly-convened Court-Martial, made up of new members, for the purpose of trying the petitioner a second time. As soon as it was appropriate, petitioner raised the objection of former jeopardy, as he had in his letter of protest to the Convening Authority. It was denied at the outset of the second trial. The petitioner then went on trial for the second time for the same alleged offense.

6. The Constitution of the United States provides (in the Fifth Amendment thereto):

> ". . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Article 44 of the Uniform Code of Military Justice provides as follows:

> "(a) No person shall, without his consent, be tried a second time for the same offense.
>
> "(b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.
>
> "(c) A proceeding which, subsequent to the introduction of evidence but prior to a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused shall be a trial in the sense of this article."

7. At the second trial the Government called as its first witness the airman who allegedly had been involved with petitioner in the charged act. Following the airman's testimony, petitioner, through counsel, moved for production of 1) a tape recording made by the civilian agent

of the Office of Naval Intelligence during the interrogation of the airman shortly after the alleged offense took place, and 2) notes made by the same Agent Mendelson (see paragraph 3 *supra*) during this same interview. An out-of-court hearing was then called to consider this motion. In testimony of other civilian ONI agents at this out-of-court hearing, it was admitted that such a tape recording was in fact made of this interview with the airman directly after the alleged act. The law officer so found. Agent Mendelson, himself, had earlier admitted in pretrial proceedings and before the Court of Inquiry that he had made notes during the interview of the airman shortly after the alleged act. Testimony at the out-of-court hearing further disclosed that the ultimate custodian of the recording tape in the Office of Naval Intelligence was either Agent Mendelson or another ONI employee, one Scinta. It was further disclosed that the recording tape of the airman's interview was now missing. Of all of the tapes taken of the interviews immediately after the alleged event, the Government disclosed that only the tape of the airman's interview was missing. Notwithstanding the admitted taping of the airman's interview and the admitted taking of notes during this interview by Agent Mendelson, the law officer, at the conclusion of the out-of-court hearing, ruled that 1) Agent Mendelson would not be called to testify before him regarding both the disappearance of the tape and the nature of the notes taken by him during the airman's interview, 2) that the Government would not be required to produce Agent Mendelson's notes, and 3) that notwithstanding the non-production of the tape of the airman's interview by the Government and the refusal of the Government to produce Agent Mendelson's notes made during this interview, the direct testimony of the airman would not be stricken. Petitioner maintains that these rulings are of special significance in the light of the fact that the airman was not tried for any offense and received an honorable discharge from the Air Force at the termination of the proceeding against the petitioner, which same proceeding resulted in petitioner's dismissal from service.

8. Section 3500 of Title 18 (U.S.C.) provides as follows:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."
>
> * * * *
>
> "(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.
>
> "(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." Added Pub. L. 85-269, Sept. 2, 1957, 70 Stat. 595.

9. The second General Court-Martial then proceeded to its conclusion. It found the petitioner not guilty of the charge and specification under Article 125 of the Uniform Code of Military Justice (sodomy). It did, however, find

the petitioner guilty of a violation of Article 134 of the Uniform Code of Military Justice. The Court then modified the specification of the charge by deleting the word "sodomy", on which it specifically found the petitioner not guilty and substituting therefor the specification "an indecent, lewd and lascivious act" with further descriptive language denoting an Act substantially different in legal significance than that originally charged, and an Act which wholly conforms to petitioner's explanation of the events, exculpating the petitioner. The language of the original charge and specification and that of the finding of the second General Court-Martial are set out in an Appendix for use by the Court if it deems them pertinent. On September 13, 1961, the Court sentenced the petitioner to be dismissed from the service. On March 8, 1962, the sentence was approved by the Convening Authority. On September 20, 1962, the Board of Review, U. S. Navy, with one of the three members dissenting, approved and affirmed the findings and the sentence of the General Court-Martial. On October 29, 1962, the petitioner filed a Petition with the Court of Military Appeals seeking a Grant of Review in that Court. On January 11, 1963, the Court of Military Appeals denied, without opinion, petitioner's Petition for Grant of Review in that Court. Reconsideration of this denial was also denied by that Court, also without opinion, on January 29, 1963. On January 30, 1963, the Secretary of the Navy declined further review under Article 71 of the Uniform Code of Military Appeals. The petitioner was dismissed with total forfeitures as of February 5, 1963. Petitioner has not been reinstated to duty since that date.

10. Petitioner alleges that the entire proceeding brought against him was a nullity because this proceeding violated the basic safeguards of a fair trial as this is known to federal law; the proceeding violated rights guaranteed to the petitioner by the Constitution of the United States; and the proceeding further violated rights guaranteed to the petitioner by federal statute. These violations did not constitute simple errors of judgment or differences between petitioner and the military officials as to facts. Nor did these violations constitute technical, non-prejudicial

error. These violations, in sum, deprived the petitioner of due process of law and of a fair trial as it is known in the courts of the United States. These specific violations are:

(a) Petitioner was denied the right to confront his accusers at the pretrial stage of the proceeding. He was thus deprived of his right to secure dismissal of the charge which subsequent legal determination held to be defective. He was thus deprived of his right to secure this dismissal prior to the jeopardy and humiliation of a General Court-Martial.

(b) As a concomitant of the deprivation set forth in subparagraph 10(a) hereinabove, petitioner was deprived of the right to confrontation and questioning of his accusers at the pretrial stage resulting in his loss of opportunity at that stage of the proceeding to reduce the charge against him from a violation of Article 125 of the Uniform Code of Military Justice to that of violation of Article 134. This reduction was made at trial by the Court after hearing the same witnesses whose testimony was recounted at pretrial. Petitioner was thus deprived of the opportunity to eliminate the major charge against him at the pretrial level.

(c) Petitioner was subjected to double jeopardy for the same charge, without having waived his constitutional right to be protected therefrom, without consenting to double prosecution, and without being in any way responsible for the termination of his former jeopardy, which resulted from defective procedures engaged in by the Government.

(d) Petitioner was subjected to prosecution under command control when the Government, after taking the trial out of the hands of the General Court-Martial which had experienced the defects and errors of the Government's prosecution in the first trial, was permitted to submit the case for further disposition to a Court of Inquiry, over the protest of the petitioner. Command control became especially prejudicial to the petitioner when it was necessarily disclosed at this Court of Inquiry that petitioner had already been ordered—on an earlier occasion—to trial on the charge whose disposition was before the Court of Inquiry. This fact, irrelevant to the proceeding before

the Court of Inquiry and irrelevant to the disposition of the case by that tribunal, was prejudicial in that it revealed clearly and unequivocally to the Court of Inquiry the command determination to prosecute the petitioner.

(e) Petitioner was subject to prosecution under command control in his second jeopardy, with the Government taking the trial out of the hands of the General Court-Martial, which had experienced the defects and errors of the Government's prosecution in the first trial, and placing the prosecution before a newly convened General Court-Martial.

(f) Petitioner's basic right to a fair trial was invaded when the Government blatantly violated sections 3500(b) and (d) of Title 18, U.S.C., to the grave prejudice of the petitioner.

(g) Petitioner's basic right to a fair trial was invaded when the law officer prevented the evidence of the Government's violation of sections 3500(b) and (d) of Title 18, U.S.C., from being presented to the General Court-Martial.

11. Since the petitioner was subjected to a proceeding which, because of its disregard for due process of law and petitioner's constitutional and statutory rights, was a nullity, petitioner's sentence of dismissal from the service is a nullity.

12. No action save that before the Board for Correction of Records of the United States Navy has been taken upon this claim, either before the Congress, or, except as noted, before any of the executive agencies of the Government. The pending proceeding before the Board for Correction of Records, U. S. Navy, is a post-conviction remedy whose exhaustion need not forestall action by this Court.

13. Petitioner is the sole owner of the claim herein sued upon, and no assignment or transfer of the claim or any part thereof, or any interest therein has been made. Petitioner is a citizen of the United States and loyal to the U. S. Government and has not aided or abetted in any manner or given comfort to any sovereign government that is or ever has been at war with the United States.

WHEREFORE, Plaintiff demands from the defendant all pay and allowances due and owing to him from the date of his unlawful dismissal from the United States Navy on February 5, 1963 to the date of this Court's judgment and prays for such other and further relief to which he may be justly entitled.

/s/ Joseph H. Sharlitt
JOSEPH H. SHARLITT

SHARLITT & SELIGSON
1001 Connecticut Avenue
Washington, D. C. 20006

Counsel for Petitioner

APPENDIX

CHARGE AND SPECIFICATION

Charge:

Violation of the Uniform Code of Military Justice, Article 125.

Specification:

In that Commander Richard Gerald Augenblick, U. S. Navy, did at West Basin Drive, Washington, D. C., on or about 12 January 1961, commit sodomy with James O. Hodges, Junior, airman third class, U. S. Air Force.

PLEAS

To the charge and the specification:

Not guilty

FINDINGS

Of the charge and the specification:

Not guilty of violation of Article 125 but guilty of violation of Article 134, UCMJ. Of the specification of the charge guilty, except the word "sodomy", substituting therefor the words "an indecent, lewd and lascivious act", and by adding at the end of the specification the words, "by willfully and knowingly placing his head in the lap of the said Hodges with his head in close proximity to the exposed penis of the said Hodges," of the excepted word, not guilty; of the substituted words, guilty.

DEFENDANT'S ANSWER—Filed February 19, 1965

Defendant for its answer to the petition herein admits, denies, and alleges as follows:

1. Admits the allegations of the first sentence of paragraph 1. Admits the allegations of the second sentence of paragraph 1 save for the allegation that "he had served with distinction" which allegation represents a conclusion which is denied. Admits the allegations of the third sentence of paragraph 1. Denies the allegations of the fourth sentence of paragraph 1.

2. Admits the allegations of the first sentence of paragraph 2. Admits the allegations of the second sentence of paragraph 2, except that defendant denies that plaintiff was found guilty of a different lesser charge, and by way of further answer alleges that plaintiff was found guilty of a lesser included offense.

3. Denies the allegations of the first sentence of paragraph 3, except that defendant admits that the two military policemen were not present at the Article 32 pretrial investigation. Denies the allegations of the second sentence of paragraph 3, except that defendant admits that Agent Mendelson testified at the Article 32 pretrial investigation that he had obtained sworn statements from the two civilian policemen. Denies the allegations of the third sentence of paragraph 3, except that defendant admits that prior to arraignment plaintiff again objected to the fact that the two civilian policemen were not present at the Article 32 investigation. Admits the allegations of the fourth and fifth sentences. Denies the allegations of the sixth and seventh sentences, except that defendant admits that an out-of-court hearing was held whereat Agent Mendelson and the policeman testified. Denies the allegations of the eighth and ninth sentences of paragraph 3.

4. Admits the allegations of paragraph 4 to the extent that said allegations are borne out by the actual text of

Rule 5(c) of the Federal Rules of Criminal Procedure and Article 32 of the Uniform Code of Military Justice.

5. Denies the allegations of the first two sentences of paragraph 5. Admits the allegations of the third sentence of paragraph 5, except that defendant denies that the law officer terminated the trial and adjourned the court. Defendant denies the allegations of the fourth sentence of paragraph 5, with the exception of the allegation that "this action was taken after * * * the General Court-martial had commenced and evidence had been received on the general issue," which is admitted. The allegations of the fifth sentence of paragraph 5 consitute conclusions of law to which a response is not required, but to the extent that a response may be deemed necessary, it is denied. Denies the allegations of the sixth sentence of paragraph 5, except that defendant admits that on May 12, 1961 the matter was sent by the Convening Authority to a Court of Inquiry. Denies the allegations of the seventh sentence of paragraph 5, except that defendant admits that on June 16, 1961 the case was referred to trial by General Court-martial and was sent to a newly convened Court-martial, made up of new members. Admits the allegations of the eight and ninth sentences of paragraph 5. Denies the allegations of the tenth sentence of paragraph 5, and by way of further answer, defendant alleges that after the denial of plaintiff's motion the trial continued.

6. The Constitution and Uniform Code of Military Justice are the best evidence of their contents and defendant admits the allegation of paragraph 6 to the extent that they are in conformity with the identified sections of those documents, but to the extent those allegations vary therefrom, they are denied.

7. Admits the allegations of the first four sentences of paragraph 7. Denies the allegations of the fifth sentence of paragraph 7. Admits the allegations of the sixth sentence of paragraph 7. Denies the allegations of the seventh sentence. Admits the allegations of the eighth and ninth sentences of paragraph 7. Denies the allegations of the tenth sentence of paragraph 7, except that defendant admits that the law officer ruled that the Government

would not be required to produce Agent Mendelson's notes and that the direct testimony of the airman would not be stricken. Denies the allegations of the eleventh sentence of paragraph 7.

8. Section 3500 of Title 18 (U.S.C.) is the best evidence of its contents and the allegations of paragraph 8 are admitted to the extent that they are borne out by the actual wording of that section and they are denied to the extent that they vary from that wording.

9. Admits the allegations of the first three sentences of paragraph 9. Denies the allegations of the fourth sentence of paragraph 9, and by way of further answer, defendant alleges that the court found plaintiff guilty of the specification except the word "sodomy," substituting therefor the words "an indecent lewd and lascivious act" and adding to the specification further descriptive language. Admits the allegations of the fifth, sixth, seventh and eighth sentences of paragraph 9, and by way of further answer, defendant alleges that the dissenting member of the Board of Review dissented in part and concurred in part. Admits the remaining allegations of paragraph 9.

10. and 11. Denies the allegations of paragraphs 10 and 11.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 12, and therefore denies the same. The allegations of the second sentence of paragraph 12 constitute conclusions of law to which no response is required, but to the extent that they may be deemed allegations of material fact, they are denied.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 and therefore they are denied.

WHEREFORE, the petition should be dismissed.

/s/ John W. Douglas
JOHN W. DOUGLAS
Assistant Attorney General
Civil Division

/s/ [Illegible]

/s/ Edgar H. Twine
EDGAR H. TWINE
Attorney, Civil Division
Department of Justice

UNITED STATES COURT OF MILITARY APPEALS

No. 16,465

UNITED STATES, APPELLEE

v.

COMMANDER RICHARD G. AUGENBLICK
(102649/1100), USN, APPELLANT

ORDER DENYING PETITION FOR REVIEW

On consideration of the Petition for Grant of Review of the decision of the Board of Review in case No. NCM 62-0386 of the United States Navy, it is, by the Court, this 11th day of January, 1963,

ORDERED:

That said Petition be, and the same is, hereby denied.

For the Court

cc: The Judge Advocate General
A. Kenneth Pye, Esq.
George W. Shadoan, Esq.
Cdr Werner Windus, USNR
Appellate Defense Counsel
Major Elvin R. Coon, Jr., USMC
Appellate Government Counsel

Filed Jan. 11, 1963, United States Court of Military Appeals

CERTIFIED TO BE A TRUE COPY
/s/ Alfred C. Proulx
ALFRED C. PROULX
Clerk

DEPARTMENT OF THE NAVY,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington 25, D.C.

In The Board of Review, U. S. Navy, Before
GEO. F. STEARNS, JR., Z. W. NEFF, AND W. S. TYSON
NCM62 0386

UNITED STATES

v.

RICHARD G. AUGENBLICK, 102649/11, COMMANDER,
U. S. NAVY

Review pursuant to Article 66(c), UCMJ, of general court-martial convened by Commandant, Potomac River Naval Command, U. S. Naval Station, Washington 25, D. C. Sentence adjudged 13 September 1961

(Decided 20 September 1962)

CDR WERNER WINDUS, USNR, Appellate Defense Counsel.

CDR CARL B. KLEIN, USNR, Appellate Government Counsel.

A. KENNETH PYE, Esquire, Individual Counsel for Accused.

DECISION

Upon trial by general court-martial accused pleaded not guilty to the Charge and specification thereunder alleging sodomy in violation of Article 125, Uniform Code of Military Justice. He was found guilty by the court of the lesser included offense of an indecent, lewd and lascivious act in violation of Article 134 of the Code. He was sentenced to be dismissed from the service. On 8 March 1962, the sentence was approved by the convening authority.

The voluminous record in this case is composed of eight volumes which include, (1) Article 32, pretrial investiga-

tion, (2) the original trial wherein the charge and specification was withdrawn by the convening authority, (3) a Court of Inquiry, (4) another Article 32, pretrial investigation, and (5) the second or completed trial.

Appellate defense counsel has assigned three errors which we shall, insofar as is practicable, discuss in the order as submitted. However we will first set forth briefly the facts which gave rise to the preferring of the charge and specification against this officer.

The evidence adduced indicates that on the night in question the accused after having attended an office party where he consumed drinks of scotch with little water, proceeded to his home. Not feeling like turning in, he left home and visited a restaurant with a bar located in Virginia, where he had a few beers and then proceeded to an officer's club at a nearby Army Post. There he drank more beer, watched T.V. and then proceeded to Washington, where he visited a bar and again watched T.V. and drank more beer. In the meantime, becoming extremely tired and desiring a cup of coffee he entered a "White Tower" restaurant, where he secured his coffee and engaged in conversation with an airman who was waiting for a bus which would return him to his base in nearby Maryland. It is not clear from the record who initiated the conversation but it resulted in the accused and the airman taking a ride in the accused's automobile. Eventually, the accused parked the automobile in the vicinity of West Potomac Basin where they were apprehended by two Metropolitan Police Officers, taken to the Third Precinct, charged with disorderly conduct, and delivered over to military police. The accused testified in his own behalf that he was driving toward the "Fourteenth Street Bridge"; that he was very, very sleepy and felt that it was unsafe to drive and therefore stopped in the area mentioned and went to sleep; that the next thing he remembers is the glow from the flashlight of one of the arresting officers. The airman, was was in full military uniform at the time of the arrest, testified for the prosecution, that the accused first informed him that he had his, the accused's, uncle's car and that they could go to his uncle's home for some rest; that refusing this offer he went for

a ride with the hope of being returned to his base; that upon parking the automobile accused asked whether he could lay his head in the airman's lap and after certain preliminaries an act of sodomy was performed upon him by the accused. The arresting police officers testified that they noted the accused's head disappear from the driver's side of the vehicle and upon inspection found the accused's face very close to the exposed privates of the airman.

I. The Law Officer Erred in Denying the Accused's Action to Dismiss the Charge and Specification on the Ground of Former Jeopardy

For the purpose of clarity it is felt appropriate to review the particular parts of the various proceedings having a bearing upon this assignment.

At the outset of the first Article 32 pretrial investigation, defense counsel objected vigorously to going ahead with the proceedings in the absence of the two Metropolitan Police Officers who would not appear unless subpoenaed. The defense counsel stated "There is a procedure in existence for securing their presence." The investigating officer noted the objection and through sworn testimony of an agent of the Office of Naval Intelligence accepted as evidence written documents containing jurats and purporting to be the sworn statements of the two police officers. Upon completion of the investigation the investigating officer recommended that the accused be brought to trial before a court-martial. *United States* v. *Samuels*, 10 USCMA 207, 27 CMR 280.

During the first trial held on 1 May 1961, the defense counsel, renewed the objection, concerning the appearance of the police officers, made at the Article 32 pretrial investigation, and moved that the charge and specification be dismissed and stated in part:

> Those policemen were readily available by processes of the Navy with which the Legal Officer was completely aware, namely that a Court of Inquiry, which would have subpoena power, could be employed, and objections were made at that time to the investigating officer against proceedings with the investigations in the absence of those officers. (R14, 16, Vol. II).

We also find the following language in further argument on a motion for dismissal by defense:

> I believe and I submit to the law officer, that I don't think I could have made it any clearer right at the very outset that we've not only objected, but without using the words "Court of Inquiry" as such, which I say again, I don't think was necessary; the Investigating Officer, the Commander, the Legal Officer, he knew what I meant without using the touch stone, Court of Inquiry, but we were told that this is the proceedings, this is the way we are going to proceed and that's it. (R27, Vol. II).

After much argument by the defense and government in an out-of-court hearing concerning the defense's motion to dismiss, the law officer has this to say:

> * * * as to the second aspect of the defense motion as noted I consider it a motion for appropriate relief since this is the proper motion directed to alleged defects in the pretrial investigation. As I noted previously, the defense has an opportunity to examine these witnesses prior to the time that they testify if the defense so desires and the request is made for such opportunity. In this light I would inquire of the defense for purposes of clarity whether the defense desires at this time a further pretrial investigation or a court of inquiry to be held in this matter? (R42, Vol. II).

Defense replied:

> Yes, sir. * * * The answer to the law officer's question is that very definitely we would ask for a court of inquiry. That was what we had meant by implication at the very beginning, sir. (R43, Vol. II).

The law officer denied this aspect of defense motion stating:

> The material presented by the defense makes it appear that the testimony of the two police absent witnesses at the pretrial, whose absence was objected

to by defense, was received by the pretrial investigating officer in the form of sworn statements as prescribed by paragraph 34, Manual for Courts-Martial, Article 32, UCMJ and currently decided case law. Further it does not appear that an effort or request was made on the part of the defense to avail itself of the procedures specified in Article 49 of the Uniform Code of Military Justice. Nor does it appear from the matter presented that the Commanding Officer of the accused at the time of the pretrial investigation acted arbitrarily or capriciously in holding an Article 32 type investigation with knowledge that the 2 police officer witnesses if called for voluntary attendance by the investigating officer would decline to so attend and thus render them unavailable since subpoena powers did not exist with the investigation officer. Nor does it appear that the Article 32 type investigation was held or directed with the intention of depriving the accused of confrontation and cross examination opportunities. It is therefore my opinion that the proper purposes of Article 32, UCMJ were served by the pretrial investigation held and that such investigation was lawfully conducted. Your motion in this regard is therefore accordingly denied. (R44, Vol. II).

The out-of-court hearing having been concluded the court reopened and the airman testified, giving very damaging evidence against the accused. At the conclusion of the airman's testimony the trial counsel announced that his next witness would be one of the police officers. At this time the Law Officer afforded the defense whatever opportunity it desired in connection with examining the witness prior to his testifying at trial. (R107, Vol. II.) The court recessed to afford defense time to examine the witness. There was then another out-of-court hearing, wherein the defense stated that in their interrogation of the police officer he categorically stated that he had not sworn to the statement which was later accepted by the investigating officer at the pretrial hearing and to which reference was made that it was a sworn statement. (R111, Vol.

II.) The defense, because of this, again moved to dismiss the charge and specification as being defective ab initio. (R112, Vol. II.) The police officer was then called and examined by the trial and defense counsel. During the examination the police officer stated "No, sir. I never swore to the facts in that statement." (R114, Vol. II.) After hearing testimony given by the ONI Agent who took the statement from the police officer and testimony of the Investigating Officer the Law Officer stated that he considers the motion made by the defense to be a motion for appropriate relief and "should be granted and is so granted in that regard.": He further considered it a matter properly within the province of the Convening Authority to determine what disposition is to be made of this matter and as to any further action in regard to the charge and specification.

Thereafter the Convening Authority withdrew the charge and specification from the Court and on 12 May 1961 convened a Court of Inquiry which met on 23 May 1961. At this Court of Inquiry the police officers testified under oath. The Court of Inquiry recommended that the accused be brought to trial by general court-martial on charges of violation of Articles 125, 133 and 134, Uniform Code of Military Justice. (R185, Vol. III.)

On 13 July 1961, at the request of the defense, an additional pretrial investigation was held for the purpose of discovery, through examination of witnesses under oath, and to obtain and record the sworn testimony of certain witnesses. We need not, at this time, concern ourselves with this particular investigation as it does not bear on the assignment presently before us. (R1, Vol. V.)

On 10 August 1961 a new general court-martial composed of new members was convened for the purpose of trying the accused for the violation of Article 125, Uniform Code of Military Justice, one specification alleging that he committed sodomy upon the body of a particular airman. The court met on 14 August 1961 and at the request of the defense a continuance was granted until 5 September 1961. On this date the court re-convened and the defense counsel moved that the charge and specifica-

tion be dismissed on grounds that the Fifth Amendment of the Constitution was violated. (R25, Vol. VI.) After much argument by defense and government, the Law Officer denied the motion. (R49, Vol. VI.)

With the above background in mind we now move to the first assignment. In support of this assignment appellant avers that it is well settled that jeopardy attaches when evidence has been received on the general issue, citing *United States* v. *Wells*, 9 USCMA 509, 26 CMR 289, and that such evidence had been received in the instant case. It is further argued that had the convening authority withdrawn the charge with the consent of the accused or upon the accused's motion, there would be no complaint but at no time did the accused move or consent to the withdrawal of the charge. Appellant also contends the lack of consent plus the subsequent proceedings brings the case squarely within the guidelines of *Green* v. *United United*, 355 U.S. 184, 78 S. Ct. 221; also, cited is *United States* v. *Gori*, 376 U.S. 364, 81 S. Ct. 523 (1961), *Wade* v. *Hunter* 336 U.S. 684, 69 S. Ct. 834, and other authorities.

Appellee counters with argument that there was no exception taken by the defense on the Law Officer's rulings in denying the defense motions to dismiss; that the government gave the accused his desired relief and therefore he cannot now complain. Citing 15 Am. Jur., Criminal Law, Sec. 403, and *United States* v. *Ivory*, 9 USCMA 516, 26 CMR 296, and other authorities.

We are mindful that this assignment presents a serious question concerning the meaning and application of that provision of the Fifth Amendment to the Constitution which declares that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb * * *"

However, the former jeopardy provision of the Fifth Amendment does not mean that every time an accused is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. When this may be done without barring another trial depends upon all the circumstances of the particular case and not upon the mechanical application of an abstract formula. (*Wade* v. *Hunter*, supra.)

From the very beginning of the first Article 32 pretrial investigation, the counsel for the accused, maintained their right to have certain witnesses present for the purpose of cross examination. Although not using the particular phrase "Court of Inquiry", the defense made it clear to the investigating officer that there was, in the service, an established administrative procedure which includes subpoena powers requiring the presence of witnesses for the purpose of examination.

The investigating officer through the sworn testimony of witness Mendelson, an ONI agent, accepted two statements of the police officers. Prior to the receipt of the statements the investigating officer had received the oral testimony of the airman who was subjected to vigorous cross examination by defense counsel. The investigating officer also attempted to secure the presence of the two police officers but was informed by competent authority that they would not appear unless subpoenaed.

The Article 32 pretrial investigating officer is not required to decide difficult legal questions or adhere to the strict rules of evidence. Accordingly, he is not precluded from considering statements of witnesses not available for personal testimony, even though this unavailability affects the accused's rights to cross examine. *United States* v. *Samuels*, supra.

In examining the sworn testimony of the airman, we are of the opinion that the investigating officer possessed sufficient information and grounds upon which to base a recommendation for trial by court-martial. "An Article 32 pretrial investigation is a preliminary proceeding, not a trial on the merits." *United States* v. *Samuels*, supra.

In view of the testimony of the police officer, that he had not sworn to the statement the law officer was faced with the possibility of a defective pretrial investigation, notwithstanding the fact that much testimony damaging to the accused had been presented by the airman and further that the defense had now taken advantage of the law officer's offer affording the defense the opportunity to fully and completely examine the police officers. Confronted with this unique situation the law officer made the following ruling:

LO. Well, I believe that on the authority of the Samuel's case at least there is a question of fact here as to whether or not the statement of Mr. Round was in fact sworn to, and I don't consider it within the province of the law officer to determine such a question of fact. I think it is not properly a matter for the court to determine, since it is a matter not concerned with findings. I consider it is a matter which is properly within the province of the Convening Authority to determine what disposition is to be made as to this matter and as to any further action in regard to the Charge and Specification. On that basis, I consider that the motion made by the defense, which I consider to be a motion for appropriate relief, should be granted and is so granted in that regard. Under those circumstances, you will advise the Convening Authority that the motion for appropriate relief has been granted based on matters concerning the validity of the pretrial investigation for whatever further disposition he desires to make. (R134, Vol. II.)

The defense made no objection to the law officer's ruling. Thereafter the convening authority withdrew the charges and specification from the court and convened a Court of Inquiry. Thus the defense was finally granted that which he originally requested. (R43, Vol. II). *United States* v. *Stringer*, 5 USCMA 122, 17 CMR 122.

Appellant relies rather heavily upon the dissent in *Wade* v. *Hunter*, 336 U.S. 684, 69 S. Ct. 834, and the case of *Green* v. *United States*, 355 U.S. 184, 78 S. Ct. 221.

In *Wade* v. *Hunter*, supra, the convening authority of a general court-martial withdrew the charge from a court which had heard argument of counsel, closed to consider the case, and then opened and requested two witnesses who were 22 miles away and too ill to travel. This occurred in Germany at a time the American troops were advancing. In view of the tactical situation, the distance to the residence of such witnesses had become so great that the case could not be completed within a reasonable time, therefore, the case was transmitted to another com-

manding general nearer the witnesses. A new trial was held and the accused pleaded former jeopardy which was denied and he was convicted. He then brought habeas corpus proceedings in federal court. The court ordered his release and the case went to the Supreme Court. In overruling the lower court the Supreme Court said that there may be unforeseeable circumstances that arise during a trial making its completion impossible and in such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. The court went on to say that the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. The minority asserted that the harassment to the defendant from being repeatedly tried is not less because the Army is advancing and that the guarantee of the Constitution against former jeopardy is not to be eroded away by a tide of plausible-appearing exceptions.

As stated above, the law officer was faced with a unique situation, a possible defective pretrial investigation which may well have been the basis for nullifying the entire proceedings. The Court of Military Appeals in the *Samuels* case, supra, made clear that should witnesses not be available for examination during a pretrial investigation, any statements of such witnesses must be sworn statements. This protects the accused from baseless charges and assures the convening authority of possessing reliable information upon which to base his decision concerning the disposition to be made of the matter. The courts are forever seeking the truth and jealously protect the rights of an accused not to be tried upon scurrilous information. *United States* v. *Nichols* 8 USCMA 119, 23 CMR 343.

The defect here is considered a judicial one which strikes at the heart of our judicial proceedings and, therefore, required immediate remedial action to assure a fair trial and to keep the proceedings free from substantial doubt as to legality, fairness and impartiality. We are, therefore, of the opinion that the law officer's action in

returning the case to the convening authority was proper, and that he did not abdicate his authority to declare a mistrial. Further, we do not believe that the convening authority usurped the authority possessed by the law officer.

We distinguish the case at bar from the *Green* case, supra, in which Green was charged with first degree murder but was found guilty and sentenced on a lesser included offense of second degree murder, however, because the jury's verdict was silent as to the original charge of first degree murder he was retried and found guilty of the original charge. Justice had been done at the first trial and there was no "manifest necessity" warranting a second trial to keep the proceedings free from substantial doubt as to legality, fairness and impartiality. In the case at bar we feel there was a "manifest necessity", warranting a second trial.

In *United States* v. *Gori*, supra, also cited by appellant, the judge, on his own motion and with neither approval nor objection by defense counsel withdrew a juror and declared a mistrial. It is unclear what reasons caused the court to take this action, which the Court of Appeals characterized as "overassiduous" and criticized as "premature". Nevertheless, the court below did not hold the ruling erroneous or an abuse of discretion. But after discussing the wide range of discretion which the "fundamental concept of the federal administration of criminal justice" allows to the trial judge in determining whether or not a mistrial is appropriate—a responsibility which "is particularly acute in the avoidance of prejudice arising from nuance in the heated atmosphere of trial which cannot be fully depicted in the cold record on appeal", the court concluded that the judge "was acting according to his convictions in protecting the rights of the accused". The Supreme Court in affirming the action of the lower court stated in part:

> It would hark back to the formalistic artificialties of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously to exercise their most sensi-

tive judgment—according to their own lights in the immediate exigencies of trial for the more effective protection of the criminal accused.

In the case at bar the law officer clearly set forth his reasons for submitting the question to the convening authority and we have stated above our reasons for finding the law officer's action to be proper.

We find the cases of *Stringer* and *Ivory*, supra, to be of particular help in resolving the issue before us.

The Charge in the *Stringer* case was withdrawn from the first court because the convening authority considered certain remarks made by the court's president concerning the trial counsel's presentation of the case to be "highly prejudicial to both Government and the accused". The defense objected strenuously to the withdrawal of the charge and reasserted that objection by way of plea in bar when brought before the second court-martial.

The court discusses thoroughly the theory of "former jeopardy" and related articles of the Uniform Code including the legislative history of certain of these articles.

The court decided that the convening authority has the power to withdraw the charges prior to the finding when there is a "manifest necessity", without the attachment of jeopardy and that Congress did not intend to confer on an accused, either under Article 44, Uniform Code of Military Justice, or otherwise, a right to be placed, by reason of trial incidents beyond the control of the Government, in such a position that he may win and cannot lose in a trial.

We have determined above that there was a judicial mistake present in the case at bar and therefore it was necessary to withdraw the charge in order to keep the proceedings free from substantial doubt as to legality, fairness, and impartiality.

In *Ivory*, supra, the accused was charged with desertion under a specification which described his unit as an ordnance unit when in fact his unit was the Overseas Replacement Depot. The error resulted from the misinterpretation of "ORD" on the "morning report", and was discovered by the president of the court and made known at the time he announced the finding of guilty. The trial

counsel moved to amend the specification to conform to the proof. The defense objected and suggested that the proper procedure would be a dismissal of the specification on the basis of fatal variance and the convening of a new court to try the accused on a properly pleaded charge. The law officer directed the trial counsel to consult the convening authority. The convening authority concluded that there was a fatal variance, withdrew the charge and appointed a new court. Before this second court the defense moved to dismiss the charge on the ground of former jeopardy. The motion was denied.

The Court of Military Appeals in holding the action of the convening authority to be proper stated that it could refuse to consider the merits of the accused's appeal since the procedure followed was that suggested by the defense and usually an accused cannot insist upon specific redress and then complain because the government gave him his desired relief. However, in the interest of justice the court considered the merits of the appeal. (Headnote No. 1.)

In discussing Article 44, Uniform Code of Military Justice, the Court has the following to say:

> It has been axiomatic to our jurisprudence that the jeopardy provisions of the Constitution are waived by an accused who is enjoying a new trial as a consequence of his own successful appeal from a former proceeding. This waiver would not, of course be applicable in all appeals in military law since under our procedure, an accused may be the beneficiary of certain automatic appeals. Articles 66(b) and 67(b), UCMJ, * * *.

In summary we find, at the first trial, that the police officers were present and available as witnesses; that testimony very damaging to the accused had already been received by the court through the testimony of the airman. It therefore, cannot be said that the Government lacked witnesses or that it failed to present substantial evidence. (Article 44 UCMJ) also, *United States* v. *Stringer* and *Wade* v. *Hunter*, supra.

The law officer made clear his reasons for granting the defense motion which he properly termed a motion for

appropriate relief. His reasons are set forth above. He believed on authority of the *Samuels* case supra, there was a question of fact as to whether or not the police officer had sworn to his statement. And indeed there was a question, since the officer said he did not swear to the statement and ONI, agent Mendelson was not certain but felt he had taken the officer's oath after taking the statement. The law officer considered this matter not one for his or the court's determination but one within the province of the convening authority and therefore, submitted the matter to that authority. We do no doubt that had the law officer considered the matter one for his decision, he would not have hesitated to declare a mistrial. We are unable therefore, to see, as stated before, wherein the convening authority usurped in any manner the authority possessed by the law officer or that the law officer abdicated his authority. For these reasons we distinguish this case from the objections set forth by the Chief Judge in *Stringer* and *Ivory*, supra.

From the very outset of the preliminary proceedings, the first pretrial, and again during the first trial, the defense made clear their desire to have a Court of Inquiry convened. The convening authority acceded to their desire by convening a Court of Inquiry for the purpose of correcting a possible defective pretrial investigation. There were other means at the disposal of the law officer and the convening authority to clarify this issue and remedy the defect but we do not believe it is for us to be a "Monday morning quarterback" in this particular instance since we see nothing here that would lead us to believe that the action taken by the law officer and the convening authority was for any purpose other than to cure a defect and assure the parties a fair and impartial trial. As stated, a prima facie case against the accused had already been made out. There was no objection to this procedure by the accused, and he cannot now claim prejudice on this basis. (Ivory, supra.)

There is another matter which appears in appellant's brief under this assignment, i.e., the concern of the president of the first court with what he labeled "administrative delays". There is no question that this officer dis-

played irritation in the delays caused by the lengthy out of court hearings. (R118-120, Vol. II.) Whether or not this irritation would have affected his and other court members' impartiality is unknown and a moot question since the court was adjourned and did not reopen as the charge and specification was withdrawn from that court and none of its members sat on the new or second court. Further although it may have been sufficient reason to declare a mistrial such was not the basis for the withdrawal of the charge and specification. No prejudice to the accused resulted from the President's irritation or remarks extending therefrom.

It is our opinion that an unforeseeable circumstance arose making the completion of the first trial so legally defective as to demand a retrial. The law officer and the convening authority then took steps necessary to assure a fair and impartial treatment of both the accused and the Government. We therefore, deny this assignement of error.

II. The Law Officer Committed Prejudicial Error in Failing to Comply With the Provisions of the Jencks Act

(a) The law officer erred in refusing to call Agent Mendelson for the purpose of receiving live testimony (1) relative to the missing tape recording of Airman Hodges' oral statement and (2) relating to the handwritten notes which Mendelson previously testified that he had made contemporaneously with Hodges' oral statement

(b) The law officer erred in denying the defense motion to strike Airman Hodges' testimony upon the failure of the government to produce the tape recording of Hodges' oral statement

A statement of the events bearing upon this assignment is considered appropriate.

On the night in question the Metropolitan Police notified the Armed Forces Police that they had placed the servicemen under arrest. Since the servicemen were mem-

bers of different services the duty man of the Armed Forces Police notified the investigative organizations of the Navy and Air Force. Agent Mendelson of ONI Headquarters, and Agent Conner of OSI, Air Force, were assigned to the case. These agents, accompanied by Agent James of the local Navy Command's Intelligence Office met Commander Augenblick and Hodges at the Armed Forces Police Headquarters situated aboard the U. S. Naval Weapons Plant, Washington, D. C. The agents, Commander Augenblick and Airman Hodges proceeded to an interview room. It was decided between Conner and Mendelson that since Hodges was a member of the Air Force, Conner would conduct the interrogation. Conner conducted the interrogation, Mendelson was present and stated he made some rough notes and James stated that he was in a sound booth and made an electrical recording of the interrogation. At the completion of the interrogation, which is estimated to have lasted 20-25 minutes, Conner told Mendelson that he was taking Airman Hodges to OSI Headquarters and there he would secure Hodges' written statement and furnish Mendelson a copy. Mendelson then interrogated Commander Augenblick and James states he also, made a recording of this interrogation.

James testified that the next day he took the recordings to ONI Headquarters and upon finding Mendelson engaged, delivered the recordings to Mendelson's superior, Agent Fason. Fason first testified that he told James to give the recording to Agent Scinta but later testified that he remembered receiving the recordings from James and that he gave them to Mendelson. Mendelson having been ordered to Norfolk, Virginia, for duty placed certain tape recordings, including the tape of Commander Augenblick's interrogation into the hands of personnel who are charged with the duty of stowing and preserving such material. James later secured these tapes and they were played during the second pretrial investigation but the tape of Hodges' interrogation was not among them. A thorough search of ONI Headquarters was conducted with negative results in an effort to locate the Hodges' tape. Seven personnel of ONI Headquarters who had official connection with the handling, storage and filing of tape recordings

were questioned concerning the whereabouts of the Hodges' tape. After an extensive examination and cross examination of these witnesses including Agents James, Mendelson and Fason no one could be found who had heard a play back of the Hodges' tape or who had seen the tape except possibly James who as stated before, gave the tapes to Fason.

After Hodges had testified on direct examination at the second trial, the defense demanded production of (1) the tape recording of Hodges' testimony made by Agent James during the interrogation of Hodges and (2) notes made by Agent Mendelson at the initial interview. The law officer, without calling Agent Mendelson, reviewed the testimony of Mendelson and others set forth in the records of the pretrial investigations and Court of Inquiry and denied the motion to produce the notes on the ground that these notes did not constitute a "statement" within purview of 18 U.S.C. 3500. The law officer ordered Governmen to produce the tape recording or show cause why it was not available. The Government through witnesses showed that a thorough search for the tape was unsuccessful. The defense then moved that Agent Mendelson be produced to testify concerning the tape, particularly in view of Agent Fason's testimony to the effect that he gave the recording to Mendelson. The law officer refused to require his production and denied the defense motion to strike Hodges' testimony.

In taking the action outlined above, appellant avers that the law officer erred in that the so called Jencks Act, 18 U.S.C. 3500, which outlines the procedures governing the production of statements made by witnesses of the United States, was violated. In support of argument in this respect appellant relies upon *Campbell* v. *United States*, 365 U.S. 85; *Palerno* v. *United States*, 360 U.S. 343; *Clancy* v. *United States*, 365 U.S. 312; *United States* v. *Thomas*, 282 F. 2d 191; *United States* v. *Aviles*, 200 F. Supp. 711; *Killian* v. *United States*, 82 S. Ct. 302; and other authorities.

Appellee countered to the effect that through the testimony of many witnesses it was shown that no one had ever played or heard the tape played and that a thorough

search to locate same was unsuccessful, therefore, logic is more on the side that there was never a tape than it is on the side that there ever was one. As to Agent Mendelson's notes, appellee states the notes were made by Mendelson during the initial interview of Hodges by Agent Conner; that at this interview Mendelson, Conner and Hodges were present and upon completion of the Interview Conner took Hodges to OSI Headquarters where Hodges' statement was written and therefore his notes had nothing to do whatsoever with the writings of Hodges' statement.

The Jenck's Act, 18 U.S.C. 3500, provides:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material

excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

There is no question but that the statute requires the production of any statement of a government witness, in-

cluding an electrical recording of an interrogation, *in possession of* government which relates to subject matter as to which witness has testified. When it is *doubtful* whether production of a particular statement is compelled by statute, such statement must be submitted to the judge for an in camera determination. The defense, of course, may use such material for impeachment purposes. *Killian* and *Campbell*, supra.

Unlike the *Campbell* case, supra, wherein the judge refused to require the Government agent to appear and submit to examination by the defense, the record of the case at bar is replete with evidence which supports the position that the law officer went to great lengths to assist the defense and government in their quest to locate the missing tape recording or determine what disposition had been made of it. The law officer demanded the government to produce the tape. When it could not be located he granted recesses to allow searches to be conducted for the tape and the call of witnesses which might shed light as to its whereabouts. Agent Mendelson testified that he did not order or request Agent James to make a recording of Hodges' interrogation, did not hear a replay of the recording and did not receive the recording, although he did receive the recording of Commander Augenblick's interrogation and other recordings not germane to this case. None of the witnesses, including James, had heard a replay of the recording, in fact none, except James, had seen a tape known as a recording of Hodges' testimony during that first interrogation. Agent Mendelson did not interrogate Hodges, it was Conner who conducted the initial interrogation as he was the OSI, Air Force Agent in charge of the case and Hodges was an airman. Except for Agent James' testimony that he made an electrical recording of the initial interrogation, there is no other evidence that, at this time, a statement by Hodges exists since Agent Conner took Hodges to the Air Intelligence Headquarters where Hodges with Conner's assistance made a written statement, a copy of which was given to Agent Mendelson and was available for inspection by the defense. Agent Mendelson appeared as a witness, several times during the various phases of the proceedings, having

been recalled from Norfolk on one occasion. He was subjected to vigorous cross examination by the defense. We therefore, cannot agree that Agent Fason's testimony to the effect that he remembered giving certain tape recordings, received from Agent James, to Agent Mendelson, warranted the ordering of Agent Mendelson to again appear as a witness for this purpose. Testimony had been received that prior to his transfer to Norfolk, Agent Mendelson handed over all recordings in his possession—including Commander Augenblick's to custodians of this material.

Furthermore, Airman Hodges testified during the first pretrial, Court of Inquiry, second pretrial and the second trial. He withstood vigorous cross examination by the defense. His testimony did not waver.

In view of the foregoing we feel much as the court did in *Aviles*, supra when it commented upon the government's failure to produce certain notes taken by an Assistant U. S. Attorney during his interview of a witness he was preparing to testify at trial, by stating:

> * * * "and while this question can rarely be answered in the negative without grave doubts, we feel confident that we are presented here with that rarity so that we can state, under the circumstances, that defendants would not have been materially aided, that denial of access to the notes in issue did not influence the result and that, in sum, their cross examination was not unduly restricted." Mindful of the Supreme Court's admonition in *Rosenberg*, 360 U.S. 371, that a "court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which defense is entitled", nevertheless, the court stated, "in context of this long trial and in view of the fact that the witness's credibility had been so exhaustively explored we hold that the failure to produce the notes was not prejudicial to defendants".

In the case at bar there was no resistance to producing the tape recording, it was the failure to find the recording, nor is there any evidence of destruction or bad faith

or deliberate refusal to produce, as suggested by appellant in his supplemental brief. All of the witnesses were under oath and we cannot without substantial evidence to the contrary, hold that there was a deliberate refusal to deliver the tape or that these government employees were guilty of gross negligence of a degree requiring corrective action on our part.

It was the responsibility of counsel for defendants, to pursue ascertainment of correctness of the Government's claim that the tape recording which was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government. The law officer, in our opinion, assisted the defense immeasurably in the attempt to locate the tape. We are unable to see wherein he abused the discretion allowed a judge in determining matters of this nature, nor are we able to see wherein his action prejudiced the accused. On this basis we find this part of the assignment without merit. *Campbell, Aviles* and *Killian cases*, supra.

The notes taken by Agent Mendelson were offered to the defense during the Court of Inquiry investigation. The following is the colloquy wherein Agent Mendelson offered defense the notes:

> Q. Now, where are those notes that you took?
> A. I believe that I can produce them if you feel necessary. They were just rough pencil notes as far as I recall. I don't have them with me, but I may still have them.
> Q. Now at that point had you talked with either of the civilian policemen?
> A. No, sir, I had not. (R116, Vol. III.)

At this point the defense questioning concerned the general practice of reporting by the Armed Forces Police.

During the second pretrial Agent Conner was called as a witness and it is felt that the following colloquy pertaining to the interrogation of Airman Hodges, which took place during examination by defense sheds some light on the question before us:

> Q. Did Mendelson do any of the questioning at this interview—did he?

A. Yes, sir. As I recall, he asked a few pertinent questions as to "Now was the individual dressed?" "Did he Hodges know the individual to be a member of the U. S. Navy?" "Did he know his rank?" and a few other questions along that category, and "Whether or not he could recognize this person again?" Just along that category sir.

Q. And do you recall what the answers to those several questions were?

A. Oh, Hodges replied he couldn't recognize the individual and he described the automobile, described the attire, the civilian clothing the commander was wearing—allegedly wearing—and he did not know his last name. He knew him as "Dick". He said the individual introduced himself as "Dick".

Q. He didn't say that he knew that he was in the Armed Services or the Navy specifically?

A. No, he didn't. He didn't say. If my recollection is correct, he did not say he was a member of the Armed Forces.

Q. Well, didn't you say that Mendelson asked him if he was?

A. Yes, and I believe the answer was "He didn't know."

Q. And that interview took about fifteen minutes, you say?

A. That is correct, sir—perhaps less.

Q. And then what occurred?

A. We left Airman Hodges sitting in the interrogation room while Mendelson and I departed. I told Mendelson at that time I would take Hodges to our office at Suitland, Maryland, and obtain these written statements, which at that time Hodges agreed that he would furnish to the OSI. Having no further need for Mendelson—having no further dealings with Agent Mendelson, having no further need for me or for me to be there, I departed, taking the airman with me. Mendelson said that he would proceed to interview the commander and, of course, a copy of the statements and the ONI reports would follow.

Q. Now did either of you take any notes during this interview at the Weapons Plant?

A. I took no notes.

Q. And do you recall what Mendelson did?

A. No, sir, in that respect I can't—I don't believe he did. (R17-18, Vol. V.)

Agent Mendelson being questioned by the defense, in the following colloquy, states the nature of his notes taken during Agent Conner's interrogation of Hodges:

Q. And do you recall any questioning that you yourself did of Hodges?

A. No I didn't. I left most of the questioning to Conner. I may have asked him a couple of questions, but we don't usually break in on another man's interview. I may have asked him a couple of questions because I did, as I think I mentioned before, I did jot down a couple of rough notes at the time.

Q. And I assume that you made a recording of this that you could refer to so as to be certain as to these aspects, isn't that correct?

A. No, I'm not certain that we had any recording. I do recall that the information that was given at this interview was later more or less typed up in—you might say a memo report from my own information just setting down such things as what time I was called, what time I arrived there, and what Hodges said. But in putting down what Hodges said, I used Navy terminology briefly, which would not—in other words it wasn't verbatim—of what Hodges said, in my little memo.

Q. Well, now, Mr. Mendelson, these interview rooms are set up as such so that recordings may be made of the interview of an interviewer, isn't that correct?

A. Yes, sir.

Q. And is it also correct that an electronic or some sort of mechanical recording was made of this interview?

A. I'm not sure that an electronic or a recording was made of this interview. There was a recording made of my interview with Commander Augenblick.

Q. And that was in the same room which you had interviewed Hodges, isn't that correct?

A. Yes, sir.

Q. And the reason that you used that room for initially the interview of Hodges and subsequently the interview of Commander Augenblick was so that it may be recorded, isn't that correct?

A. Not necessarily. We don't record every interview we make, but we can—we use them because we can if [we] feel it's necessary.

Q. Well, now, you know definitely that a recording was made of Commander Augenblick's.

A. I do.

Q. With reference to his interview?

A. I do.

Q. Do you know whether or not it was made of Hodges?

A. I can't recall right now if it was. It might very well have been, but I don't have * * *.

Q. The likelihood is that it was, was it not?

A. No, the reason that I can't recall whether it was is because we had, we felt, two witnesses to any statement that Mr. Hodges may have made and therefore we may not have recorded Hodges' testimony at that time figuring that the statement and the two agents would be corroborating enough.

Q. Well, now, how can this be determined?

A. Well, I can only make a check on it and find out.

Q. Could that be done now?

A. I think so. I could probably make a telephone call back to the office over there and find out whether or * * *

Q. Don't you recall of your own independent recollection, Mr. Mendelson?

A. I honestly don't. As I say, the reason I don't recall that was because I don't have it, as I do have the recording in the case of Commander Augenblick, and this was a verbal interview of—where no statement, no written statement at that time was taken, and we felt that * * * Conner said he would pre-

interview Hodges and later on supply me with a written statement. (R51-53, Vol. V.)

We see from the above colloquy that Agent Conner conducted the initial interview of Airman Hodges; that Agent Mendelson did ask Hodges a few questions; that Agent Mendelson did make a few rough notes; and that the rough notes were not a verbatim record of Airman Hodges interrogation. Also, that no written statement was made by Airman Hodges at this time. Further, the defense apparently did not consider Agent Mendelson's notes to be of particular significance as they did not, at this time, request their production.

Jencks v. *United States*, 353 U.S. 657, holds that the defendant on trial in a federal criminal prosecution is entitled, for impeachment purposes, to *relevant* and competent statements of a government witness in *possession* of the Government touching the events or activities as to which the witness has testified at the trial. The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian.

It is also the function of the trial judge (law officer) to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. *Campbell*, supra.

The Jencks Act limits access by defendants to such government papers as fit the act's definition of "statements" which relate to the subject matter as to which the witness has testified. *Palerno*, supra.

In determining whether notes are producible, i.e., whether they are "statements" the standard to apply is "do they set forth in substance what the witness said". Further, the notes must be "substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement." See section (e) (2) of 18 U.S.C. 3500, supra.

Now then, the law officer had before him all of the previous proceedings that had been conducted. In denying

the defense motion for the production of Agent Mendelson's notes he stated:

> LO. Well, I'm basing my ruling primarily on the additional pretrial which I have before me and also the fact that in order to qualify under Title 18 of the United States Code, Section 3500 is that this must be a statement, and I feel that the tape recording certainly qualifies in that respect; I do not feel at this time that the notes that the agent may have made in particularly using navy terminology, that it is necessary to proceed further than the tape recording. (R77-78, Vol. VI.)

There was further argument after which the law officer stated:

> LO. The original ruling I made still stands, that is, the government will not be required to produce any rough notes that agent Mendelson allegedly made, however, the government is directed to produce the tape recording of the initial interview of Hodges, if available, and to call witnesses.

We agree with the Law Officer's ruling concerning the defense's request for production of Agent Mendelson's notes for the following reasons:

> (1) The notes were offered to defense by Agent Mendelson and defense had ample opportunity during prior proceedings to request the notes. This they failed to do.
>
> (2) The notes do not meet the criteria of a "statement" as set forth in (e)(2) of 18 U.S.C. 3500. There is ample evidence of record that the notes were "a few rough notes" and not a verbatim recital of the oral statement made by Airman Hodges at the initial interview.
>
> (3) Hodges' written statement was made in the presence of and with the help of Conner at OSI Headquarters, Suitland, Maryland. Agent Mendelson was not present at this itnerview.
>
> (4) In the context of these long proceedings Airman Hodges was, on several occasions, vigorously

cross examined by the defense wherein his credibility was so exhaustively explored that, in our opinion, the failure to produce the notes was not prejudicial to the accused.

(5) That in matters of this nature the law permits the law officer to exercise sound discretion and we do not believe that this law officer abused that discretion.

We feel that the above reasons, support the law officer's holding on this point of law.

We therefore, find no merit in this assignment of error. *Campbell, Killian, Aviles,* supra, and *United States* v. *Combs* 28 CMR 866.

III. The Law Officer Committed Prejudicial Error in Failing to Instruct on the Offense of Disorderly Conduct Which Was Reasonably Raised By the Evidence as a Lesser Included Offense of the Offense Charged

Appellant avers that the law officer should have instruct on the lesser included offense of disorderly conduct in violation of Article 134, Uniform Code of Military Justice. Appellant concedes that there was no obligation to instruct the court-martial on the elements of disorderly conduct unless it was fairly raised as a reasonable alternative to the offense charged. It is argued that in this case the offense was raised as a reasonable alternative since both Hodges, who had been promised an honorable discharge, and the police officers were impeached by inconsistences in their stories. Upon this basis appellant submits that the court could have possessed reasonable doubt concerning whether he had commited an indecent, lewd, and lacivious act, while being satisfied that he was guilty of disorderly conduct.

Appellee counters with the argument that when a citizen becomes a soldier he submits himself to a special code of laws which have been suited to the requirements of military life and therefore, it is not befitting this concept to regard sodomy between officers and enlisted men as simply disorderly conduct. It is further argued that the law officer instructed on the lesser included offense of in-

decent, lewd and lascivious acts with another and that the defense made no objection to these instructions.

In his instructions to the court the law officer had the following to say concerning lesser included offenses:

> * * * I believe, under the state of the evidence, that only one lesser included offense may be in issue at this time. However, if during your deliberations you believe that any other lesser included offense may be in issue I ask that you open the court, make your feelings known and I will give you further instructions on your inquiry concerning any other lesser included offense. It would be totally improper for you to come forward with a finding of guilty of any lesser included offense on which you had received no instructions whatever. And that lesser included offense, I believe, that may be in issue is that of indecent, lewd or lascivious act with another. (R369, Vol. VII.)

Then at the completion of the instructions and just prior to informing the court on the method of voting, the law officer inquired, and we quote:

> At this particular point I would like to inquire, now, if the Government has any further requests for further instructions or any objections to those given?
>
> TC. No request for further instructions; no objections.
>
> LO. I will ask the same of the defense?
>
> IDC. (Mr. Kendrick): Only those we requested in the closed session. (R374, Vol. VII.)

Referring back to the closed session indicated in which the law officer informed both counsel of the instructions he proposed to give, the following transpired:

> * * * before I proceed, to advise you of any proposed instructions I may have, that I would like to inquire first of the Government, what if any lesser included offense does the Government feel might be in issue?
>
> TC. I haven't given it any thought, as a matter of fact. I suggest that the lesser included offense may

include an indecent or lewd act with another, which is indicated at Instruction 149 in the Law Officer's Manual, and possibly indecent assault, both of which would be offenses under Article 134.

LO. Did you mean "indecent assault", Commander? I believe the only indecent assault would be committed on a female.

TC. Well, then, I will withdraw that.

LO. Very Well. Does the defense desire to be heard on what they consider being a possible lesser included offense?

IDC. (Mr. Kendrick): We certainly would object to a lesser included offense. The charge is sodomy. We think that the evidence has got to show sodomy or nothing and that this proposed lesser included offense that has been suggested by the law officer is not in any way supported by any evidence. And we come back to the basic premise that it's sodomy or it isn't sodomy. Its guilty or not guilty, as I se it. (R332-333, Vol. III.)

Appellant having taken the position at trial that there was no included offense to that charged and litigated, cannot now, on review adopt a contrary position. We reject this assignment as being without merit. *United States* v. *Mundy*, 2 USCMA 500, 9 CMR 130; *United States* v. *Wilson* 7 USCMA 713; 23 CMR 177 -hn 3.

We believe that our conclusion is correct for a further reason. Airman Hodges testified that an act of sodomy had been committed upon him by the accused. He was subjected to vigorous cross examination by the defense on at least two occasions and although his testimony may have been inconsistent as to minor details it was not inconsistent when describing the events essential to the commission of the offense charged. We have read and reread the testimony of the police officers and agree that there are inconsistencies but only of a minor nature such as who was driving the patrol car, whether the accused's automobile lights were on and whether the motor was running, etc. Their testimony was consistent as to where the accused's head was positioned in relation to the exposed

privates of Airman Hodges. We do not wish to set forth the exact testimony here but it is clear in the record at pages 18, 32, 43, and 56, Volume III and pages 157, 161, 169, 170 and 176 of Volume VI. From the reading of this testimony we must disagree with appellant's contention that Airman Hodges' and the police officer's were impeached by inconsistencies in their stories.

The law is well settled that the law officers' refusal or failure to instruct on a lesser offense is not error if that offense is not reasonably put in issue by the evidence. *United States* v. *Wilson*, supra; *United States* v. *Richardson* 2 USCMA 88, 6 CMR 88; *United States* v. *Williams*, 9 USCMA 3, 25 CMR 265.

In this case we have a naval officer of senior rank with some eighteen years of service who, having consumed a considerable quantity of alcoholic beverage, invited an enlisted man of the U. S. Air Force to go for an automobile ride during the wee morning hours of a particular day in January 1961. The airman was in the uniform of his service and therefore, his service status should have been obvious to the naval officer. The ride ended along the West Potomac Basin where the officer and airman were apprehended by Metropolitan Police and charged with disorderly conduct due to the position of the officer's head in relation to the exposed privates of the enlisted man. Most certainly the Navy does not expect this type of conduct on the part of one of its officers nor is it considered merely disorderly conduct.

Military officers are placed in command of our young servicemen, this confers upon an officer a great responsibility. Therefore, dishonor, misrepresentation, any act involving reflection on personal integrity or moral character is of far greater infamy, and it is looked upon with far greater opprobruim, when committed by an officer, than when committed by one from any walk of life, except, perhaps, the ministry or priesthood.

We have independently evaluated the evidence before us and have determined that the accused was not prejudiced as it is our opinion that "disorderly conduct", was not reasonably raised by the evidence and therefore, the law officer was under no duty to instruct on that offense.

Accordingly, the findings and sentence as approved on review below are affirmed.

GEO. F. STEARNS, JR.
(See Concurring-Dissenting).

Z. W. NEFF

I concur.

W. S. TYSON

CONCURRING-DISSENTING OPINION

I concur in the majority's disposition of the first assignment, but for a different reason.

In my opinion, there was no abdication of authority by the law officer when he referred the case to the convening authority, nor, conversely, was there any usurpation of the law officer's prerogatives by the convening authority, who only carried out the actions already indicated by the law officer and acquiesced in by the defense counsel. It appears obvious to me from the record that all parties were looking toward a court of inquiry—the only military tribunal, outside a court-martial, able to satisfy accused's pretrial demands for subpoenaing witnesses and which could only be convened by the convening authority.

Since a court of inquiry was convened, correct procedure required the convening authority to withdraw the case from the original court, for after having called the two police officers as witnesses and after there having been subjected to cross-examination by the defense, out of fairness to the accused the convening authority should then make a completely new determination as to whether or not the case should go on to trial. This brings me to what I feel is the determining factor with regard to this assignment.

At the conclusion of the court of inquiry and the additional pretrial, the convening authority referred the case to a new court. From the facts in this case, I feel that he was justified in doing so to make sure that the interests of the accused were fully protected. (*Gori* v. *United States*, 376 U.S. 364; *United States* v. *Stringer*, 5 USCMA

122, 17 CMR 122), because the president of the court already had indicated he was irritated with the delays in the case—and this fact was certainly not only well recognized by the defense counsel but causing him concern, as will be shown below.

Shortly after the initial trial opened, defense counsel made a number of motions and arguments which resulted in out-of-court hearings, and, of course, impeded further progress of getting on with the trial at that particular time. The trial then proceeded on through the testimony and cross-examination of the first witness, Hodges, the alleged co-actor in the sodomy. At the conclusion of this testimony, the law officer made it known that he was going to "afford the defense whatever opportunity that it desires in connection with examining this witness [one of the police officers] prior to the time that he testifies." This prompted the following colloquy between the president and the law officer:

> LO. Well, Mr. President, I have indicated to the defense that they will have an opportunity to talk to these witnesses prior to their testimony * * *.
>
> PRES. Is this going to be a continuing thing, or is this something we can get the defense counsel caught up on? Is this going to be the question each time or each time there is a new witness, sir?
>
> LO. No, sir.
>
> PRES. If this is the case, this is going to take us an awful long time.
>
> LO. No, sir, this is just only with regard to two particular witnesses.
>
> PRES. I wonder if the defense counsel could promise with respect to when these two witnesses could be met?
>
> LO. Well, sir, I feel he can meet at least one of them today. The other witness has already departed apparently.
>
> PRES. Is this going to kill the whole day again tomorrow?
>
> LO. I believe not. I think not, sir. We could possibly set up to reconvene at 11 o'clock, depending on

whether or not trial counsel can get that witness back tomorrow for interview.

TC. I will have them both back here tomorrow.

PRES. I would rather go beyond 3 o'clock and try to get something done today, if it runs that late. I do not at this time want to make a decision that we will not have any further hearing today. I prefer to give the defense whatever time he needs, and I would like to hold in abeyance the decision as to when we will terminate for the day.

LO. Fine. I am sure defense has tried to meet your suggestion as to 1500.

PRES. Well, I would much rather have you not worry too much about my time as far as hours are concerned. I am more interested about getting business done so that we can get ahead with the proceedings. I will worry about the time if they will worry about getting business done.

LO. I am sure they had that in mind, sir.

The foregoing prompted this rejoinder from the defense counsel:

IDC. May I make this clear to the court, that this is not our intentional doing, that we have not been able to talk with these witnesses before. I don't want the court to feel that we are trifling with the court's time, but I think it is very clear that despite continued efforts on our part we have not been able to even discuss the case with these two officers, and, of course, it would not apply to any witnesses that are to be called by the prosecution.

PRES. Well, I think the thing for us to do is to close while you do that business and we will remain available in hopes that we can get on with business.

After defense counsel had examined the police officer, he pointed out to the law officer that police officer Round's statement at the pretrial had never been sworn, despite Agent Mendelson's testimony at that proceeding to the controry. Counsel for accused then stated:

> * * * Now, as I have pointed out here, we are in the second day of trial * * * and for the first time we find out that the statement was not sworn to. It is clearly a violation of the Samuel's case. * * *
>
> Now, the other officer, of course, has been released to go back to duty * * *, *I feel that we are faced with a situation which in addition is complicated by the fact—I think it must have been apparent to the law officer as it was to everyone with whom I have discussed it with—that when the court adjourned to permit * * * me to interrogate this police officer, the court was obviously very much irritated,* and what I feel was not knowing all of the facts, *what they felt was a typical defense dilatory tactic of some sort,* but I think the law officer recognizes * * * that this is not of our doing at all. *Yet, we have an officer's career at stake before an obviously irritated court. I have a feeling that the feeling expressed by the president in so many words and by the obvious demeanor of several of the other senior officers immediately adjacent to him that—is the case ever going to get on, in effect. In that respect, we will*—first of all, I would renew my motion based on this defect in the pretrial proceedings * * * and I would like * * * to call this police officer (as a witness for the limited matter that I have stated) to the court. Therefore, subject to the law officer's desires on that subject, I will *move to dismiss the charge and specification as being defective ab initio.* (Emphasis supplied).

Police Officer Round was called and testified in the out-of-court hearing that he was not sworn at the time he made the pretrial statement. At the completion of his testimony, the law officer pointed out that the invesigating officer and the ONI Agent Mendelson would have to be called. This again prompted defense counsel to express his concern over what he felt was the animus against him and his cause by the members of the court. He asked the law officer:

> Sir, before we recall the court, may I respectfully inquire as to what you plan to say to the court?

The law officer answered in part:

> I'm going to admonish them that it is not due to any circumstances involving the defense or is it to be construed in any way—reflects on either counsel or the accused and any member who feels that he is being—has his mind concerned with this aspect of delays should kindly so indicate at this time.
>
> IDC. I deeply appreciate that.

The court was reconvened and the law officer kept his word, which prompted the following exchange between the law officer and the president:

> PRES. I would hope that in the future that the time of the court could be given some consideration. While we met from ten until three, I feel that these other things may well go in other hours than between ten and three. I would like to know administratively what can be done to assist either side? I'm not interested in which side. I'm interested in reducing delays. Who is the man to see in that connection?
>
> LO. There is nobody to see. It is my responsibility to see that this trial is conducted in a fair, orderly, and impartial manner.
>
> PRES. Including the administrative matters?
>
> LO. Including any matters in that connection. When I think that the trial can be speeded up, I will do so.
>
> PRES. Certainly it hasn't been speeded up here so far without any question of the legal side. It seems to me that it is unnecessary for us to sit while these things which I think could have been done long before, such as the things this afternoon. Do you agree?
>
> LO. No, sir. I do not agree with you because my position is that the defense is entitled to interview these witnesses, and that's what I'm going to do.
>
> PRES. There is no question there administratively be the opportunity to interview them?
>
> LO. I'm not in a position to so say, Admiral.
>
> PRES. I want to find out who is concerned with that.

LO. Admiral, I recommend that you ascertain your answer to that question upon completion of trial.

PRES. And accept whatever comes along in the meantime.

LO. I can only say, Admiral, that I am bound under the law to make the rulings and to let the case proceed as I best deem it to proceed, and any other aspect of the case if attempted to be gone into during the course of trial, I feel would prejudice the case. In other words, administrative assistance to avoid those delays would help prejudice this case. There isn't any administrative assistance that could speed up this case. There is just no practical way of doing it any other way. Whether or not it could have been done before is not the point.

PRES. Can you indicate to me who has this concern quite apart from the court as to what could be done to avoid this sort of administrative delay?

LO. This delay, Admiral, is not administrative at the present time.

PRES. Well, I'm not sure that I understand that. However, I think there is nothing that can be done under the circumstances. The court will * * * adjourn * * *

The convening authority may withdraw the case from one court and refer it to another when in his opinion—taking all the facts into consideration—there exists a manifest necessity to prevent a miscarriage of justice. As pointed out by the Supreme Court in *Wade* v. *Hunter*, supra, there have been cases where the trial judge has discovered facts, during trial which indicated to him that a member—or members—of the jury might be prejudiced or biased against either the accused or the Government, and "It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial." In my opinion, from the facts in this case, the defense counsel was justified in feeling that the president of the court was "irritated"—along with "several of the other senior officers immediately adjacent to him"—at what counsel felt the president believed to be a "typical defense dilatory tactic." Accordingly, under the facts of this case, the

convening authority was called upon to refer the case to a new court in order to ensure that the ends of justice were not defeated. *Wade* v. *Hunter*, supra.

In summary, I do not find that accused has been unduly harassed by receiving a remedy he sought (a solution to the problem of the unsworn policeman); nor do I find anything in this record to suggest that the convening authority appointed a new court to help the prosecution—in a case that was going badly—by giving it another opportunity, under more favorable circumstances, to convict the accused. *Gori* v. *United States*, supra

It is when we approach the second assignment that I must part company with the majority of the Board. I feel that prejudicial error was committed by failure to comply with the Jencks Act with respect to the Hodges' tape.

Briefly, the facts which frame this issue follow: The Government called as its first witness at the second trial the co-actor, Airman Hodges. At the conclusion of his testimony on direct, defense moved for production of notes made by Mendelson and a tape recording taken by ONI Agent James during the interrogation of Hodges immediately following the incident. The law officer reviewed the pretrial investigation record concerning the notes and the recording, denied the motion to produce the notes on the ground that they did not constitute a "statement" within the meaning of the Jencks Act, but ordered production of the tape recording or show cause why it was unavailable.

Agent James testified unequivocally that he did make a tape recording of the Hodges interview—along with two "Augenblick" tapes—and that he took the three tapes to the ONI office which housed Mr. Mendelson. The latter was not there so he left the tapes with Mr. Fason, Mendelson's supervisor. Fason at first denied that the tapes were ever turned over to him, instead testified that they had been turned over to a Mr. Scinta. Subsequently, however, when the tapes were traced to him by other witnesses he recalled that James did turn the tapes over to him and that he had then turned them over to Mr. Mendelson.

Testimony was received that a search was unsuccessful in locating the Hodges tape; although the other Augenblick tapes had been carefully preserved and were available.

When it was obvious that the Hodges' tape was not going to be produced and after it had been disclosed that the tapes had previously been in the possession of agent Mendelson (the principal investigating agent in this case) for months, the defense moved that Mendelson be called as a witness to testify concerning the tape. The law officer refused to require Mendelson's production as a witness on the basis that he had already testified extensively at the pretrial proceedings and would add little or nothing to that testimony, and the law officer also denied the defense motion to strike Hodges' testimony.

The Jencks Act, 18 U.S.C. 3500, established the procedures governing production of statements made by witnesses before United States courts, and it applies to all prosecutions brought by the United States.

Pursuant to the Act, the trial judge is required to order production by the Government of any statement of the witness in the possession of the United States, relating to the subject matter to which the witness has testified. If the Government elects not to comply with a court's order directing production, the trial judge must strike the witness' testimony or declare a mistrial if justice so dictates. 18 U.S.C. 3500 (b), (d).[1] Case law has interpreted the Act as placing upon the Government the burden of proving, once statements are shown to have been in existence, that they were destroyed in good faith and in accord with normal business practices in order to escape the sanction of the Act. *Killian* v. *United States*, 82 S. Ct. 302; *United States* v. *Combs* 28 CMR 866.

As stated previously, Agent James testified repeatedly that he personally had taped the statement of Airman

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[1] 18 U.S.C., section 3500(e)(2) defines a statement as:

"A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Hodges and that he had thereafter turned that tape—along with two other Augenblick tapes—over to Agent Fason. This testimony of a prosecution witness was forthright and unimpeached in any particular whatever. Agent Fason at first testified that he had directed that the tapes be turned over to Agent Scinta, but, subsequently, he changed his testimony and recalled that James had, as he testified, in fact given him the tapes, and that he, Fason, had turned the tapes over to Agent Mendelson.

It can hardly be disputed but that the Hodges' tape had in fact been in existence and that it was a producible item under the Act. Mendelson when asked about the tape at the court of inquiry was very vague. He was "not certain" that a recording was ever made of the Hodges' interview, yet he knew Agent James was in the recording room at the time and that his only purpose for being there was obviously to record the Hodges' interview. Further, James testified that he bound the tapes together with a rubber band and turned them over to Agent Fason, who testified that he turned these same tapes over to Mendelson. Agent Carroll then testified that some months later Mendelson turned the Augenblick tapes over to him for safekeeping but that he did not know whether Hodges' tape was included. From the foregoing, it appears that the path of the Hodges' tape led directly to Agent Mendelson. The defense counsel urged that he be called to testify, noting that it was important that his credibility be weighed by the law officer and since there had already been a change in Fason's testimony it was quite possible that Mendelson might change his and thus the mystery of the Hodges' tape would be cleared up.

It is important to keep in mind that Mendelson was one of the moving characters in this trial. He is the one who testified that he had taken a sworn statement from Officer Round, yet Round denied under oath that he ever swore to the statement, and it is significant that the subsequent testimony of both policemen was somewhat weaker than their purportedly sworn statements. Mendelson was also unusually vague about the recordings. It was important to the defense to have the recording of the initial interview of Hodges, a 20 year old, frightened enlisted

man, being interviewed by two agents, with a third monitoring, in the early hours of the morning, especially since there are some indications in the record that at the very outset Hodges denied that "anything" happened. I feel that had Mendelson been called he might have been able to answer more specifically the question of what happened to the tape. Certainly he was available and the defense should have been given an opportunity to examine him on that issue. Since the law officer ruled that he would not strike Hodges' testimony in the absence of proof of wilful suppression of the recording, the defense was precluded testimony of the individual who was in charge of the investigation and in whose possession the recording had apparently rested. Under these circumstances, it was virtually impossible for the defense to have sustained the burden placed upon it. *Campbell* v. *United States*, 365 U.S. 85.

The question of what action should be taken when statements once available can no longer be produced was discussed by an Air Force Board of Review in *United States* v. *Combs*, supra. According to the Board "ordinary prudence requires that if verbatim notes are made at all, they should be retained until final review of the case." Further, it was noted that since the Jencks decision (353 US 657) and statute, supra, had been expressly brought to the attention of all Air Force Judge Advocates, there exists a duty to preserve any statements until at least after it has been determined whether their production will be required at trial. The Board went on to remark that "The evidence establishes that the destruction or disposal of the stenographer's notes occurred as the result of negligence, rather than through an act of 'conscious' destruction, by the Government. Nevertheless, we cannot allow the intent of that law to be circumvented by such negligence." In addition "The Jencks decision and statute were aimed at preserving and perfecting the accused's rights to cross examination of prosecution witnesses on the basis of certain prior statements made by them. Here, the accused was precluded from examining such statements through the negligence of the Government."

The evidence in this record shows that in fact—and no doubt influenced by the Jencks Act—a careful procedure for the preservation of tapes had been worked out by the Office of Naval Intelligence until final disposition of the case. The record discloses that the tapes in question were carefully labeled and numbered by Agent James; that there was a designated custodian for them; and that the Augenblick tapes (excepting Hodges') were in fact carefully preserved and stored. Of all the tapes made in this case, it seems odd that only the tape of the principal prosecution witness, Hodges', suddenly comes up missing—the others being so carefully preserved. Under such circumstances, it is difficult to explain this mystery—in the absence of deliberate destruction or gross negligence. Perhaps Mendelson would have explained how the tape could have been missing, outside these possibilities, since the tapes were in his possession, but he was not called specifically for that purpose.

I am not prepared to speculate, in view of Fason's change in testimony regarding Mendelson's possession of the tapes and Mendelson's vagueness about any tape being taken when he knew that James was in the sound room monitoring the interview, that Mendelson would not have added anything to his initial testimony. It is certainly a good possibility that his memory—like Fason's—would have been jogged into recollection by the testimony of the other witnesses.

I believe the Government should have the burden of proving that once statements are shown to exist that they were destroyed in good faith and in the routine course of business to avoid the Jencks Act. Here, it was clearly shown by the evidence that the routine course of business called for preservation of the tapes until final review. Accordingly, I would return the case for a rehearing.

Z. W. NEFF.

[103] TRANSCRIPT OF PROCEEDINGS

Held May 1-3, 1961 (general court martial)

* * * *

The law officer reconsidered his initial ruling and will permit counsel to pursue the matters to which objection previously had been made.

Would you call the witness.

James Orland Hodges resumed his seat on the witness stand, was reminded that his previous oath was still binding and testified as follows:

CROSS-EXAMINATION (con'td)

Questions by the defense (IDC):

Q. Hodges, to go back to the parked car for a moment, were there any other cars in the vicinity where you were parked?

A. There was one car ahead of us.

Q. About how far ahead of you?

A. Approximately 50 feet.

Q. And it was parked during the entire time up until from the time you parked up until the time the police arrived, Hodges?

A. No, it wasn't.

Q. How long was it parked?

A. It was just shortly after they had pulled up there, I believe.

Q. Now isn't it a fact, Hodges, that you were asked the same question previously in a preliminary hearing and stated that so far as you knew that car remained there until the time the police arrived and you all pulled away?

A. I don't know, sir. I don't remember this.

Q. You don't remember it?

A. No, sir.

* * * *

[Witness: Norman Round]

[114] Questions by the defense, IDC:

Q. Did you on or about January 13, 1961 give a statement to an agent of the Office of Naval Intelligence?

A. Yes, I did.

Q. Do you recall that agent's name?

A. I believe it was Mendelson, some name similar to that. The exact spelling or pronunciation, I don't know. I'm not sure.

Q. Now, would you state to the law officer whether or not your oath was taken as to the facts in that statement?

A. I never swore any oath to the facts in the statement.

Q. Were you asked to take any oath by him?

A. Not to my recollection, no.

Q. And do you recall seeing that statement at a later time?

A. Not the one that I signed. I saw a copy of the same.

Q. And did that recite in that copy that you saw the fact that you were sworn?

A. Down at the lower lefthand corner there was a notation that it was subscribed and sworn before this ONI man.

Q. And is that a fact?

A. No, sir. I never swore to the facts in that statement.

IDC: Thank you. That's all.

LO: Counselor, do you have the statement that was presumably utilized by the investigating officer in connection with the proceedings?

TC: Yes, sir. That was Government Exhibit No. 3 at the pretrial.

LO: We will make this an appellate exhibit in the next sequence. I don't know whether it's D. or E.

REPORTER: It's E.

LO: This appears to be some kind of reproduced copy. I want you to show it to the defense.

* * * * *

[Witness: William G. Mendelson]

[124] to take a sworn statement from him concerning the incident in which he had been involved as a patrolman. He said it was all right with him, and there was a police typewriter available—I had none of my own—and I proceeded to type out, at his direction, a statement while he was there giving me the information relating to the incident. After I got through typing the statement out, I showed it to him. He was unhappy with it, and he made

some corrections in his own handwriting on it. He was still unhappy with it, and I said, "Well, this is a sworn statement and must to the best of your knowledge and belief be taken in that fashion." I said, "I will be very happy to do it over for you so that we can get it as accurate as you can recall the circumstances." With that, he agreed, and I typed over a statement utilizing further information that he gave me and which this is a copy of the second statement.

Q. That is the Appellate Exhibit?

A. That is the copy of the second statement that I took. Both of these statements had on them "Subscribed and sworn to before me this 13th day of January 1961 at the Third Precinct, Metropolitan Police Department, Washington, D. C." and I assume from these, it is customary after a person reads a statement—

IDC: I object to what is customary. It's what happened in this case.

LO: We will get to that, counsel.

WITNESS: I'm trying to testify to the best of my recollection. I'm trying to explain how I take the statement, counsel. I gave him the statement back. The first one he already rejected. I gave him the second one back. He said that it was all right. I said, "Would you sign it." He did. Then I signed the swearing part of it, and that was to the best of my recollection the way this statement was obtained. I cannot actually remember, but I'm sure that I did swear him in some fashion. He was well aware that these were sworn statements, because at the time of [125] taking the second statement I reiterated the fact that this was a sworn statement and must be as accurate as he could recall the circumstances.

Q. You don't recall giving him any kind of an oath and having him swear to it. What is your recollection now? You say that you believe that is what transpired based on your customary procedure?

A. Right. I take hundreds of statements, and I try to keep them as close to what we call the book as possible. And I cannot recall right now exactly the mechanics of how I took the statement on January 13th. It's my assumption that I took it in this fashion from reading these two statements.

LO: Do you have any questions, counsel?
IDC: Just a few, sir.

EXAMINATION BY THE IDC:

Q. Are you a notary public in the District of Columbia?

A. No, sir, I'm not.

Q. Are you a notary public anywhere?

A. I am not.

Q. Other than the authorization which you have from the Secretary of the Navy in your job as an ONI agent, do you have any authority to administer an oath?

A. I do not believe so. I believe that the Secretary of the Navy Instruction is the only one that gives me that authority.

Q. Now, if we have testimony before us to the effect that that jurat which you have referred to on there was not on that paper, would you deny that fact?

A. Absolutely. If you want to inspect the original, counsel, you can see that it is typed on there with the same typewriter that the original statement was typed.

Q. Did you use a police typewriter or your own which you carry with you?

A. No, sir, a police typewriter in Patrolman Round's case.

[126] Q. Now, you have twice in your testimony used the expression "sworn statement." Other than for the purposes of our inquiry here, would you use that expression to a witness before you swore him?

A. Before I take the statement I tell him "this is to be a sworn statement," depending on the witness, of course, and the circumstances.

Q. But you will agree with me that you did not swear him before the statement, is that correct?

A. I will agree to that, yes, sir.

Q. So it was not a sworn statement?

A. It was a sworn statement in accordance with the regulation that we use.

Q. At the time he made the statement—

A. I swore him after he made it.

Q. Just a moment, please.

A. I'm sorry.

Q. At the time he made the statement, it was not a sworn statement, was it?

A. You mean at the time of his verbal statement to me, I had not previously sworn him?

Q. At the time that you reduced it to typing, it was not sworn, was it?

A. Not until he swore to it, that's true.

Q. Well, now, when did he swear to it?

A. I can only assume that he swore to it immediately following his signature.

Q. You have no picture in your mind of his raising his hand or doing anything of that sort or saying "I so swear"?

A. I can't place it either way. I have no recollection either way.

Q. So that when you say a sworn statement you are saying that for the purposes of this record this morning, that's all, isn't it, because you have no independent recollection?

* * * * *

[Witness: Raymond W. Glasgow]

[130] Q. I see. He actually introduced the original and it was understood that a copy would be substituted.

A. Yes.

LO: Counselor, would you get the original at this time if it's available.

TC: Yes, sir.

LO: Let the record show that the trial counsel left the courtroom to obtain the original copy. Let the record show that the trial counsel delivered to the law officer what purports to be the original statement. It will be marked Appellate Exhibit F.

Will you show that to the witness, please.

The trial counsel handed the witness Appellate Exhibit F.

Q. I hand you an item marked Appellate Exhibit F and ask you if you can identify it?

A. Well, it appears to be the document that was introduced at the pretrial and the copy which was substituted appears to be the original of the copy which I just had in my hand.

Q. Did you utilize this document in formulating your recommendation as to what disposition should be made of the charges?

A. Well, not necessarily. There was an original witness by the name of Hodges, and this was only corroboration to go along with the Airman's testimony. So this was just actually added to it. There was a witness who appeared in person and was subject to cross-examination before the pretrial. So, this is only corroboration.

Q. But this was utilized in place of calling the witness, is that correct?

A. Certainly, yes. This was introduced as a sworn statement of the witness who was, I believe the pretrial investigation shows, the Metropolitan Policeman, and he would not appear except when subpoenaed, which I presume he was subpoenaed for this court. So this was introduced in lieu of that.

[131] Q. You understood it was a sworn statement at the time?

A. Yes, sir. I believe that the testimony before the pretrial indicates that it was a sworn statement, because Mr. Mendelson was on the stand at the time. It was introduced through his testimony.

Q. This was one of the items of evidence, was it not, that you utilized in formulating your opinion as to what disposition should be made of the charges?

A. As I say, this was just cumulative. Actually one witness, Hodges, was sufficient evidence to make the recommendation. This was cumulative. This was just corroboration. Now, without the witness who appeared at the pretrial you could say it had to depend on this, but to say say that this was not considered would not be exactly correct, and to say that this was the basis for the recommendation also would not be absolutely correct.

Q. But you say that you did consider this document?

A. Yes, sir.

LO: Do you have any questions?

IDC: Yes, sir.

EXAMINATION BY THE JDC

Q. Commander, you also listed as witnesses on your pretrial report the statement of Norman Round, dated 13 January 1961, as a part of your recommendation to your Commander that a general court-martial be ordered, isn't that correct?

A. I'm sure it's listed, Round and the other police officer.

Q. I'll be glad to show it to you.

A. I'm sure it's listed there. If it's not it should be.

LO: Let the record show the witness is receiving what purports to be a copy of the pretrial investigation from the defense counsel.

WITNESS: What was the question again.

* * * *

[134] LO: Well, I believe that on the authority of the Samuels' case at least there is a question of fact here as to whether or not the statement of Mr. Round was in fact sworn to, and I don't consider it within the province of the law officer to determine such a question of fact. I think it is not properly a matter for the court to determine, since it is a matter not concerned with findings. I consider it is a matter which is properly within the province of the Convening Authority to determine what disposition is to be made as to this matter and as to any further action in regard to the Charge and Specification. On that basis, I consider that the motion made by the defense, which I consider to be a motion for appropriate relief, should be granted and is so granted in that regard. Under those circumstances, you will advise the Convening Authority that the motion for appropriate relief has been granted based on matters concerning the validity of the pretrial investigation for whatever further disposition he desires to make.

Is there anything further at this out of court hearing? I will call the court. We will go into open court session so that I may point out for their information the general matters that have transpired so that the president can adjourn the court to meet at his call.

TC: May I ask the law officer if these out of court proceedings which have been recorded will be made available

to append to my communication to the Convening Authority?

LO: They must be otherwise the Convening Authority has no way of ascertaining what transpired during the course of these preliminary matters in this trial.

TC: Should the entire record up to this moment be appended?

LO: Yes. Counsel have any views on that?

IDC: I'm guided by the views of the law officer.

LO: Very well. The out of court hearing is concluded, and we will await the return of the court so we can go into open session and advise them.

The out of court hearing concluded at 0950, 8 May 1961.

[135] The court was called to order at 1000, 8 May 1961.

PRES: The court will come to order.

TC: All parties to the trial who were present when the court closed are again present in court.

LO: The court is advised that during the course of out of court hearings the defense made a motion which is considered one for appropriate relief directed to stated defects in the pretrial investigation. Testimony elicited from witnesses as to this issue makes it apparent that to proceed further with this case at this time to a determination of any findings would result in these proceedings being set aside as a nullity. I have, therefore, granted the motion of the defense for appropriate relief and directed the trial counsel to refer the matter back to the Convening Authority for whatever disposition he deems appropriate to make in the premises. It is, therefore, appropriate, Admiral, to adjourn to meet at your call.

For the information of the court, the matter that arose during the out of court hearings pertained to whether or not statements of witnesses who were not called at the pretrial investigation were sworn or unsworn. During the course of these proceedings—

IDC: May it please the court, I must object to the law officer informing the court as to the reason for granting the relief.

LO: Your objection is noted. During the course of these proceedings, it became apparent to the law officer

that there was a question as to whether or not such statements were sworn. This is a matter which the law officer is not in a legal capacity to resolve, nor, in the law officer's opinion, is the court in a legal capacity to resolve, since it does not go to the guilt or innocence of the accused. I, therefore, consider it appropriate for the Convening Authority to resolve this issue and take whatever disposition he desires in the premises.

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APPELLATE EXHIBIT F (general court martial)

I, Norman Round, Patrolman, Metropolitan Police Dept. Washington, D.C. attached to the 3rd Precinct, make the following voluntary statement to Mr. W.G. Mendelson, who has identified himself to me as a Special Agent of the Office of Naval Intelligence.

On 12 January 1961, I was on routine patrol in a scout car with my partern, George W. Pickerel, Patrolman also attached to the 3rd Precinct. We were patroling in the vicinity of the Tidal Basin. As we cruised along West Basin Drive we observed an automobile parked alongside the drive, just on the curve of the drive before it meets Independence Aye. Nearby are some old temporary buildings that are used as offices. As my partner and I pulled up behind the parked car which was a 1959 white chevvy with California License RWM 407, we could see two people sitting side by side throught the rear window. As we pulled up, we saw the person on the drivers side bend over out of sight toward the person sitting next to him. My partner, Pickerel, got out and walked up to the car and looked in. He then waved to me to come up and I called the Dispatcher and told him to hold us out of service for a few minutes. The time was just about 1:13AM on 12 January 1961. I walked up to the car and just as I looked in I saw a man, who had been bent over with his head down toward the other person's lap, start to move to an upright position. I then saw that the other person was in an Air Force uniform and as I watched, he took his penis which I had seen was exposed, and put it back into his pants and zipped up his fly. In the meantime, the other man turned on the car lights and made as if to start the car. Pickerel walked to in front of the car and I ran around to the drivers side and opened the door so the man would not start the car. We got their ID cards when we asked for identification and we asked the men to follow us to the Police Station. Both men were booked for "disorderly" and because they were service men, the Armed Forces Police were called and the two men who were identified as Airman HODGES and Naval Officer AUGENBLICK. There was plenty of light in the area for us

to see what was going on at the time we arrested the two men. Pickerel told me that he had seen the man on the drivers side sucking the other man's dick just before he called me up to the other car.

/s/ Norman Round
NORMAN ROUND

Subscribed and sworn to before me this
13th day of January 1961 at the 3rd Precinct.
Met PD, Wash. D.C.

/s/ William G. Mendelson
WILLIAM G. MENDELSON
Special Agent, ONI

HEADQUARTERS
POTOMAC RIVER NAVAL COMMAND
Washington 25, D.C.

Code 22
File 5830(7)
Ser: 1763
12 May 1961

From: Commandant, Potomac River Naval Command

To: Captain William R. FRANKLIN, U. S. Navy, Office of Weather Service, U. S. Naval Station, Washington, D. C.

Subj: Court of inquiry to inquire into the alleged misconduct on the part of Commander Richard G. AUGENBLICK, U. S. Navy

1. A court of inquiry, consisting of yourself as president and of Commander William C. BENDER, U. S. Navy, and Commander Joseph J. FLAHERTY, U. S. Naval Reserve as additional members, is hereby ordered to convene at the U. S. Naval Station, Washington, D. C., at 0900 on Tuesday, 16 May 1961, or as soon thereafter as practicable, for the purpose of inquiring into all the circumstances connected with the alleged act of misconduct reported to have been committed by Commander Richard G. AUGENBLICK, U. S. Navy, on or about 12 January 1961 with James O. HODGES, Jr., airman third class, U. S. Air Force, at or near West Basin Drive, S. W., Washington, District of Columbia. Commander Lazar H. BENRUBI, U. S. Naval Reserve is hereby detailed as counsel for the court.

2. The court shall make a thorough investigation into all the circumstances connected with the alleged act of misconduct. The court shall report its findings of fact, opinions and recommendations. In case disciplinary action is recommended, your attention is directed to the 1955 Naval Supplement, Manual for Courts-Martial 1951, Section 0302d(11)(c).

3. It is directed that the court notify Commander Richard G. AUGENBLICK, U. S. Navy of the time and place of meeting of the court and that he will be a party to the

inquiry and accorded his rights as such pursuant to the provisions of the 1955 Naval Supplement to the Manual for Courts-Martial, 1951.

4. The court is directed to take the testimony of witnesses under oath and to make and submit a verbatim record of the proceedings.

5. The District Legal Officer, Potomac River Naval Command is hereby directed to furnish the necessary reporters and other clerical assistance for the purpose of assisting the counsel for the court in recording the proceedings of this court of inquiry.

/s/ Thomas H. Robbins, Jr.
THOMAS H. ROBBINS, JR.

Copy to:

CDR BENDER
CDR FLAHERTY
CDR BENRUBI
CO, NavSta, WashDC

GOVT EX A

TRANSCRIPT OF PROCEEDINGS

Held May 23-25, 1961 (court of inquiry)

* * * * *

[Witness: James O. Hodges]

[81] Q. Where was he located at that time? Strike that. What position was his body?

A. Laying from under the driver's side over across me.

Q. Where were his legs?

A. Underneath the steering wheel.

Q. And was his body facing—either facing the front of the car or the back of the car?

A. More toward the front of the car.

Q. More toward the front of the car?

A. Yes, sir.

Q. Now, you say he leaned toward you?

A. Yes.

Q. All right. Go ahead.

A. He had his hands around behind my legs and moved them over to the area of my penis and asked if I was comfortable or all right, if I wanted to go.

Q. What did you understand by do you want to go?

A. If I didn't want this, to leave, he'd take me back to the bus stop.

Q. What did you tell him?

A. I told him I was all right.

Q. Go ahead.

A. Then he asked me to take my pants down. I refused. I unzipped my trousers.

Q. He asked you to unzip your trousers?

A. He asked me to take my pants off.

Q. You say he asked you to remove your trousers?

A. Yes, sir.

Q. Then what did you do?

A. I refused this. I unzipped my fly and this exposed my penis, and Commander Augenblick took hold of it and massaged it until it was erect, and placed it in his mouth.

* * * *

[83] Q. Had you met Commander Augenblick previous[ly]?

A. No, I hadn't.

Q. You didn't know him?

A. I didn't know him.

Q. Had he indicated to you previously whether he was in the military or not?

A. No, he didn't.

Q. You all went back to the police station?

A. We did.

Q. Then what happened?

A. Then we waited there. After we put our names in the book, we waited for the military police to come in, and we were turned over to the military police when they came. We left there to go down here to the Armed Forces Headquarters Building.

Q. Did you have any conversation with Commander Augenblick on the way to the police station?

A. Yes, sir.

Q. What was the nature of that conversation?

A. He told me that they couldn't prove anything, that we should get a story to match when they questioned us, and said we should tell them we were parked there to go out and take a leak; and I believe that was all, and we were just temporarily there. So, he had me repeat it on the way to the station to make sure that I had the same story. We got down to the police station, and we were turned over to the authorities there.

CC: I have no further questions. Cross-examination?

CROSS-EXAMINATION

Questions by the ICP:

Q. Did you have any further conversation with him after this conversation that you state took place in the car on the way to the police precinct?

• • • •

[102] A. That day, sir, at her dormitory at the Hospital School of Nursing.

Q. And when did you let her off or say good night?

A. Right about eleven-thirty at night, sir.

Q. And that was where?

A. That was at the same place at the Washington Hospital Center.

Q. Are you still free to come and go from Andrews Air Force Base?

A. Yes, sir.

Q. Are you still getting your honorable discharge?

A. I don't know, sir.

Q. As far as you know, it is still being processed the way the Commander originally recommended it?

A. I don't know. I know it is being processed, but I don't know what the result is going to be.

Q. But as far as you know, his original recommendation of an honorable discharge still holds?

A. Yes, sir.

ICP: I have no further questions.

REDIRECT EXAMINATION

Questions by the CC:

Q. One question. Would you explain to the court how your penis was exposed through your buttoned shorts?

A. The shorts, sir, are buttoned just at the top just about two inches. There is about a six inch space of unbuttoned shorts. That's the way they are made, sir.

Q. You say you unzipped your trousers. By unzipping, do you mean complete opening or just unzipping the zipper?

A. Just unzipping it, sir.

Q. Just unzipping the zipper?

A. Yes, sir.

CC: No further questions.

[103] RECROSS-EXAMINATION

Questions by the ICP:

Q. You didn't unbutton the top button, that regular plastic button at the top? Did you unbutton that button that was at the top of your trousers?

A. No, sir.

Q. There is a button there first and then the zipper follows from there, does it not?

A. Yes, sir.

ICP: No further questions.
CC: Do you have any further questions?
ICP: Does the court?

EXAMINATION BY THE COURT

Questions by the president:

Q. How old are you, Hodges?
A. Twenty, sir.
Q: How long have you been in the Air Force?
A. About sixteen months, sir.
Q. Sixteen months?
A. Yes, sir.
Q. On a two year enlistment?
A. Four year, sir.
Q. You are getting an honorable discharge, you think?
A. I don't know, sir, I expect—
Q. That's what in process as far as you know?
A. Sir, my Commander, my Squadron Major Haffer has recommended me for an honorable, and that is all that I know. I'm expecting a general, sir.

[104] REDIRECT EXAMINATION

Questions by the CC:

Q. By general, you mean not a general court-martial?
A. Yes, sir.
CC: Any further questions?
ICP: I have one question, if I may, sir.

RECROSS-EXAMINATION

Questions by the ICP:

Q. What makes you think you may get a general when your Commander recommended an honorable?
A. Because, sir, it has to be up to General Smith and General Allen, and they are the one's who will determine what's going to happen.

CC: For edification of counsel, I might add if the court needs it, they can probably request it. I don't think I need it.

ICP: I'm not concerned. Thank you, Commander.

REDIRECT EXAMINATION

Questions by the CC:

Q. Is it your understanding that a general discharge is under conditions other than honorable?

ICP: I think the court knows the legal effects of this. We all know what they are.

CC: You raised the question. The question has been raised. I want to know what the witness thinks this is all about.

Q. Do you know what a general discharge is?

A. No, I don't know.

RECROSS-EXAMINATION

Questions by the ICP:

Q. Your understanding from your Commander is that you have been recommended for an honorable discharge?

A. Yes, sir.

ICP: No further questions.

The witness was duly warned and withdrew from the courtroom.

• • • •

[112] DIRECT EXAMINATION

Questions by the CC:

Q. Would you state your name and your occupation?

A. William G. Mendelson; I'm a Special Agent with the Office of Naval Intelligence.

Q. And your address, please?

A. Springfield, Virginia.

CC: Your witness.

Questions by the ICP:

Q. You're assigned, I believe, to the Navy Service Center at Arlington, is that right?

A. I am.

Q. Now, Mr. Mendelson, we're inquiring about an incident alleged to have occurred on the morning of January the 12th, 1961, involving a Commander Augenblick. Will you tell us when you first were notified on that day that your services were required as a result of a civilian arrest.

A. To the best of my recollection, it was around 2 o'clock in the morning.

Q. And that was at your home?

A. At my home.

[113] Q. And by whom were you notified?

A. Special Agent Fason. Ted Fason.

Q. He would be what might be called the Duty Agent at the time?

A. Well, he's the supervising agent; not necessarily the Duty Agent, but the Armed Forces Police would normally notify him.

CC: Would you spell Fason's name?

WIT: F-A-S-O-N.

CC: Continue, I'm sorry.

Q. Did he also call you from his home?

A. He did.

Q. And that was about 2 o'clock in the morning?

A. Just about.

Q. And what did you do pursuant to that call?

A. I went to the Armed Forces Police Headquarters at the Potomac River Naval Command.

Q. And what did you do there?

A. I spoke to an Armed Forces Policeman—I believe he was a Sergeant, I'm not certain of that.

Q. What Service?

A. Of the Air Force, I believe—An Air Force Sergeant—and he made a verbal report to me concerning Commander Augenblick and Airman Hodges of the U. S. Air Force.

Q. And at the time that you arrived, where were these two individuals—Commander Augenblick and Hodges, to your knowledge.

A. I believe they were in the area of the Armed Forces Police area—in the building, anyway.

Q. But the first person you saw was this Sergeant that you think was an Air Force Sergeant?

A. The first person that I can recall actually seeing, I believe was Special Agent Conner of OSI—the Office of Special Investigation—who had also been called because of the possible involvement of the Airman. He was the [114] first one I can remember seeing and he was standing, as I recall, near the desk, and this Air Force Sergeant—I believe he was an Air Force Sergeant—was standing there also.

Q. And did the Sergeant in effect report to both of you, or did you receive any information independently from the OSI Agent?

A. I believe the OSI Agent had already been informed, but he was standing by as the Sergeant made this report to myself and to Conner who was standing right there.

Q. And then pursuant to the information you received from this Sergeant, what did you do then?

A. Agent Conner of OSI desired to talk immediately to Airman Hodges concerning this incident and we asked that both Commander Augenblick and Hodges be permitted to go into the next building, which is the Intelligence Office, PRNC, which is part of our organizational set-up . . .

Q. Well, in other words, the building that you first went into where you talked with this Sergeant and the OSI Agent was not the same building that these men were in, or they were in that building and later taken to another building.

A. As far as I recall they were in the Armed Forces Police Building which is adjacent to the Intelligence Offices at PRNC, which is an adjacent building. So that it was necessary for the purposes of interviewing these gentlemen to take them over to our office at IO, PRNC.

Q. Are the two buildings connected by a passageway or do you have to go out of one to go into the other?

A. I'm almost certain that I went outside to go into the other one, but I don't know whether there is a passageway in between them. I believe that I went outside. I'm not too familiar with that area.

Q. Now, pursuant to this request by Conner of the OSI, what physically took place at that point? You tes-

tified that he stated that he wanted to talk to HODGES? [115] A. That's right. I believe that he and I walked over to the other building and went up to the area—spaces of the Intelligence Office, PRNC where a duty agent let us in and afforded us an interview room.

Q. Well, now when you went up to this office and obtained ingress to the particular hearing—or interview room—were these two, the officer and the man, following along with you at that time?

A. No, I do not believe they came with us. I believe they must have come over after us rather than physically with us.

Q. Rather than. . . . . .

A. Rather than physically accompanying us, I believe they followed us over, because as I recall, Conner and I did go up to see if there was an interview room available; we found out there was; and to the best of my recollection we came back out to a sort of a reception area where Hodges and Commander Augenblick were.

Q. And then what did you do after you came out to this reception area?

A. We asked Hodges to accompany us back to the interview room, which he did, and Conner interviewed Hodges in my presence.

Q. Now, was there any other OSI Agents there at that time?

A. No, sir.

Q. And were there any other ONI Agents there at that time?

A. Well, there was a duty agent. . . . . .

Q. I mean who participated?

A. Not in the room, no.

Q. So that the two of you, Mr. Conner and you, took Hodges back into this interview room to interview him?

A. Right.

Q. And about how long did that interview take, do you recall?

A. Between 20 and 25 minutes I'd say.

Q. And was any statement in writing given during that interview?

A. Not at that time.

[116] Q. Did you take any notes?

A. I believe that I did.

Q. Now, at that point, this would have been roughly what time?

A. I'd say 0345 would be approximately the time we finished talking to Hodges.

Q. Are you in the Naval Service?

A. No, I'm a civilian.

Q. Have you ever been in any branch of the Armed Forces?

A. I have been. I'm a Naval Reserve Officer.

Q. You are.

A. Not on active duty.

Q. But you present status is as a civilian?

A. Yes.

Q. All right now. What did the 0345 refer to—the beginning or the ending?

A. The end of the interview with Hodges.

Q. Now, where are those notes that you took?

A. I believe that I can produce them if you feel necessary. They were just rough pencil notes as far as I recall. I don't have them with me, but I may still have them.

Q. Now at that point had you talked with either of the civilian policemen?

A. No, sir, I had not.

Q. And had you received any report in writing of anything stated by them?

A. I cannot recall, but it may be that that Air Force Sergeant gave us an Armed Forces Police Report stating what these police had said; I'm not sure on that point.

Q. What is the practice generally if there is one?

A. Well, the practice generally during an investigation of this nature is to obtain some kind of a written report or statement from any person who might have knowledge of the incident.

[117] Q. Well, as an over-all part of the investigation you mean?

A. Right.

Q. But I mean, you have had other instances I assume, where you have been called by the ASPD to come down

as a result of a civilian arrest or an arrest by the ASPD of a member of the Naval Establishment, haven't you?

A. Off hand I would say that I probably have.

Q. And that's what I'm particularly referring to. At that point, what is the general practice? Do they have a report waiting for you or do they bring that up later?

A. I don't believe there's any; I believe it's happened both ways—that we've either received a verbal report or a written report. It depends on how much time they have, I would assume, to prepare such a report. The report form that the Armed Forces Police have is a printed form which is filled in with pertinent information and therefore sometimes it doesn't take very long to fill it out.

Q. Right. But you don't recall specifically on this occasion whether you got one from this Sergeant or not when you came in?

A. No. I believe that I did, but I'm not sure.

Q. Now, the interview with Hodges included . . . . or concluded, as you recall, around 0345. What did you do then?

A. I personally went out and asked Commander Augenblick, I believe, to come back to the interview room as Hodges and Special Agent Conner departed. Conner told me that he would supply me with a written statement from Hodges as soon as he had an opportunity to prepare it—or Hodges had an opportunity to prepare it.

Q. Which? Conner prepare it or Hodges?

A. Well, Hodges would give him—supply him with the pertinent information and give him a report on the matter.

Q. Now, so this was around—somewhere between 0345 and 0400 that you asked Commander Augenblick to accompany you for an interview?

A. Yes.

[118] Q. Now how long did that interview take?

A. It took place from 0400 to 0545 in the morning.

Q. Right on the dot?

A. Just about.

Q. And that took place in the same Intelligence Office?

A. It did.

* * * * *

[123] A. To the best of my recollection, I apprised my superiors of the results of the investigation of the previous evening.

Q. In other words, what you had done so far?

A. What had been done so far.

Q. And when James left you, did that terminate his connection with the investigation?

A. Yes, sir, it did.

Q. All right, now after apprising your superiors of what had occurred so far, what did you do?

A. I'm not sure, but I think that I called Special Agent Conner to find out from Conner about any report he may have received in writing from Airman Hodges and I believe he told me that he had obtained a report in writing from Airman Hodges containing the same information that Hodges had given us the night before.

Q. About what time of the morning was this, approximately?

A. I would say 9:30, perhaps 10 o'clock.

Q. And, when, if at all, did you receive a copy of, or see the original of the statement purportedly drawn up by Hodges?

A. I don't know whether it was that day or the following day. I'm not sure.

Q. Well, now. . . .

A. I received a copy of the statement, not the original.

Q. Well, now, you interviewed Patrolman Round about 8:30 in the morning, didn't you, on that same morning?

A. If that what the record shows, that's what I did . . . . now you're speaking of the 12th of January. I don't believe it was the same morning, I think it was the next morning. I'm not certain of that. I'd like to check the [124] date on the statements that were obtained.

Q. Well, it's your recollection that the interview that you had with Round was on the following day—in other words, another 24 hour period elapsed before you interviewed Round? Is that your recollection?

PRES: May the original question be repeated?

The reporter repeated the last question.

Q. In other words, your recollection now is, the interview with Round took place the following day?

A. Yes, sir, my recollection is that it took place the following day rather than the same day the incident happened. This can be verified by records.

Q. Well, if it will assist you any, I will tell you that this statement bears the date of the following day and that was also the time that you interviewed him, is that correct—the following day?

A. It was, yes, sir.

Q. And at the time you interviewed Round, did you have in your possession the statement made by Hodges?

A. I do not believe I had that statement, sir.

Q. And on that same day you also interviewed Officer Pickeral at his home, is that correct?

A. Yes, sir, I did.

Q. Did you have in your possession at that time the statement made by Round?

A. Yes, sir, I did.

Q. Was it displayed to Pickeral?

A. No, sir, I do not believe it was.

Q. Did you tell Pickeral that you had obtained such a statement?

A. I told Pickeral that I had just received a report—statement—from Round, yes, sir.

Q. And did you, when you interviewed Pickeral, can you tell us approximately what time of the day that was? [125] A. I believe you mentioned to me that I had interviewed Round at 8:30 in the morning. I guess that's from your own records.

Q. Well, what is your recollection?

A. Well, my recollection is about 8:30 in the morning because I believe Round had been on watch the night before and I had to catch him as he came off his duty that morning. From there I believe I had to call Pickeral on the phone to make sure he was at home because he was off duty that day and he did tell me that I could come out and I think I spoke to Pickeral around 2 o'clock in the afternoon of the 13th of January. Some where around that time.

Q. And is it your recollection that at that time you had with you the statement of Hodges.

A. No, I do not believe I had the statement of Hodges with me at that time.

Q. But your recollection is that you did get such a statement some time on that day of the 13th?

A. I just can't be sure of that, counselor. I know that I received a statement; I didn't get it personally myself; it was apparently picked up by somebody else and brought to my desk or given to me by the supervising agent who had received it from another agent. In other words, that Conner, the OSI Agent did not contact me personally and give me a copy of the statement. I cannot be sure of the exact date that I received the OSI statement.

Q. The last point that we came up to on the day of the 12th was approximately 9:30 to your best recollection, at which point you reported the progress of the investigation to your superiors?

A. Yes, sir.

Q. Did you do anything further on that day with regard to pursuing the investigation?

A. Yes, sir, I believe that I went personally to see Commander Augenblick's superior to brief him on the outcome of the investigation up to that point.

Q. That was a Captain Calhoun or was Captain Calhoun present at that time?

[126] A. I think Captain Calhoun was there but I don't think that was the . . . .

Q. Captain Vanarsdall?

A. Captain Vanarsdall was the gentleman.

Q. And was also a Commander Cherbak present?

A. I think so, I'm not certain.

Q. And that was over in the Pentagon itself?

A. That was in Commander Vanarsdall's office—or Captain Vanarsdall, I beg your pardon.

Q. And other than informing them of the status of the investigation, did you do anything else regarding the investigation that day?

A. I believe I checked Commander Augenblick's record for background information. I think his record is held in the Pentagon by one of the Personnel Departments over there, and I believe I went through his record to get date —date of birth and things of that nature.

Q. Anything else—I mean that day?

A. Did I do anything else that day?

Q. In connection with this particular investigation?

A. I think I made an inspection of Commander Augenblick's desk that evening.

Q. Was that with his permission?

A. No. That was with Captain Vanarsdall's permission.

Q. Did you find anything of significance in his desk?

A. I did not.

Q. By his desk, you mean at the office?

A. At the Pentagon—his office desk.

ICP: If the court will indulge me for one moment, I think I'm about finished.

ICP consults with CP and accused.

Q. Now, coming to the interview itself with Commander Augenblick in the interview room, did you purport to read to the Commander, statements which you [127] had?

A. No, sir. I had no statements at that time.

Q. But did you not purport to read from statements to him during that interview?

CC: Now I want to object to this form of questioning. I can see no reason to go into investigative techniques. The fact is that he did interview the Commander, he has testified to this. I don't see that the techniques used is relevant unless, of course, he intends to introduce further evidence to connect it up.

ICP: I don't see any in relevance in it and if investigative techniques are involved, I think it might be of interest to this court to know.

PRES: Objection overruled.

Q. Did you understand the question?

A. Yes, sir. I did not read from any statement to Commander Augenblick—read from any statement to Commander Augenblick any information concerning this incident. I told him why he was there and I advised him fully of his rights under Article 31 of the Uniform Code and I asked him during the course of the interview if he would like to make a statement concerning it.

Q. All right. Now, my question, however, Mr. Mendelson, was did you purport . . . . . do you know what I mean by purport—to read from statements?

A. Yes, I understand. No, I did not. I emphatically told him that I had no such statements but that I was hoping to obtain a further report on this matter and I told him repeatedly that what I had was given to me verbally at that time—the information was given to me verbally, and I wanted to discuss it with him. At no time did I purport to read from anything whatsoever.

Q. Did you ever have a file folder in front of you which you referred to and indicated that you were reading from the report?

A. I had some notes in front of me which were taken, I think, as I already testified, when Airman Hodges was being questioned by OSI Agent Conner. I don't recall actually having any folder; I think I had some rough notes in front of me and inasmuch as I actually had no statements, I could not therefore tell Commander Augen- [128] blick that I did, and I know that I told him that I did not have any, but that I would get written reports. He was quite emphatic on certain parts of the interview.

Q. Now, one final question. What, if any, assertions did he make in that interview as to his guilt or innocence?

A. Do you want an exact quote?

Q. If there is such a quote, yes.

A. He said that no homosexual act had taken place and no wrong-doing had taken place.

IGP: That's all. Thank you.

* * * *

RECOMMENDATIONS

1. That Commander Richard G. AUGENBLICK, U. S. Navy, be brought to trial by general court-martial on the charges of violation of Articles 125, 133 and 134, Uniform Code of Military Justice. The appropriate charge sheet, signed by the president of this court as accuser, is forwarded herewith.

2. That a resignation for the good of the service to escape trial by general court-martial if submitted by Commander Richard G. AUGENBLICK be accepted.

/s/ William R. Franklin
WILLIAM R. FRANKLIN
Captain, U. S. Navy
President

/s/ William C. Bender
WILLIAM C. BENDER
Commander, U. S. Navy
Member

/s/ Joseph J. Flaherty
JOSEPH J. FLAHERTY
Commander, U. S.
Naval Reserve
Member

/s/ L. H. Benrubi
L. H. BENRUBI
Commander, U. S.
Naval Reserve

Counsel for the Court

HEADQUARTERS
POTOMAC RIVER NAVAL COMMAND
Washington 25, D. C.

18 July 1961

From: Lieutenant Colonel Vernon A. PELTZER, 08469/0195/0802, U. S. Marine Corps

To: Commandant, Potomac River Naval Command (Attn: DLO)

Subj: Report of further investigation conducted in the case of Commander Richard G. AUGENBLICK, 102649, U. S. Navy

Encl: (1) ComPRNC ltr Ser: 2485 of 12 July 1961 w/encl (Appointing Order)
(2) Verbatim transcript of investigative-hearing proceedings conducted on 13, 14, and 17 July 1961, in the case of Commander AUGENBLICK

1. Pursuant to the provisions of enclosure (1), an investigative-hearing was conducted and the verbatim transcript of that proceeding is submitted as enclosure (2).

2. For the reasons indicated below, the report is submitted in this form and manner, and without entering findings, opinions, recommendations or other comments.

a. I have not had access to the report of the earlier investigation which enclosure (1) indicates was conducted; such access was neither tendered or proposed by the government or the defense and was not sought by me because of the apparent nature and purpose of the hearing.

b. The proceeding was ordered in response to a request by the defense; the apparent purpose and objective sought by the defense was discovery, through examination of witnesses under oath, and to obtain and record the sworn testimony of certain witnesses. This has been accomplished.

c. The defense expressly waived the submission of such items by the investigating officer.

3. It is requested that a member of your staff append the record of this proceeding to the record of the earlier proceeding, apparently conducted in this case.

4. Unless advised to the contrary, the investigative-hearing officer considers the assigned duty has been discharged and will return to and resume his normal duties, taking no further action in this case.

5. As indicated by the acknowledgement executed below, the defense has been provided a copy of this record.

/s/ Vernon A. Peltzer
VERNON A. PELTZER

I hereby acknowledge that I have been accorded an opportunity to review the original record and have been provided a copy of this record.

Date: 19 July 1961

/s/ W. Windus
W. WINDUS, CDR, USNR

HEADQUARTERS
POTOMAC RIVER NAVAL COMMAND
Washington 25, D. C.

Code 22
File 5830(15)
Ser: 2485
12 July 1961

From: Commandant, Potomac River Naval Command

To: Lieutenant Colonel Vernon A. PELTZER, U. S. Marine Corps

Subj: Further investigation demanded by Commander Richard G. AUGENBLICK, U. S. Navy

Ref: (a) ComPRNC ltr Ser: 1763 of 12 May 1961
(b) Ltr from appointed defense counsel of CDR AUGENBLICK to ComPRNC of 7 July 1961

Encl: (1) Copy of ref (b)

1. Reference (a) is an order appointing a court of inquiry to inquire into certain alleged acts of misconduct of Commander Richard G. AUGENBLICK.

2. Reference (b) is a request by appointed defense counsel for further investigation of the matter, pursuant to paragraph 0508 of the 1955 Naval Supplement, MCM, 1951.

3. You are hereby appointed investigating officer to hear and record such additional evidence as may be presented on behalf of Commander AUGENBLICK.

4. For this purpose you will hold a hearing at 0900 on Thursday, 13 July 1961, or as soon thereafter as practicable, in building T-34, U. S. Naval Station, Washington, D. C. You will make such findings, opinions and recommendations, if any, as you may deem appropriate. You will receive testimony under oath and submit a verbatim record of the evidence, which will be appended to the original record of the court of inquiry.

5. The District Legal Officer, Potomac River Naval Command is hereby directed to furnish the necessary clerical assistance.

/s/ Thomas H. Robbins, Jr.
THOMAS H. ROBBINS, JR.

Enclosure (1)

HEADQUARTERS
POTOMAC RIVER NAVAL COMMAND
Washington 25, D. C.

Code 22

7 July 1961

From: Appointed Defense Counsel, General Court-martial, PRMC

To: Commandant, Potomac River Naval Command

Subj: General Court-martial case of Commander R. G. AUGENBLICK, U. S. Navy; request for additional pretrial investigation in the case of

Ref: (a) 1955 ES, MCM, Section 0508

1. Pursuant to reference (a), it is requested that further pretrial investigation be conducted in the subject case for the purpose of calling William G. Mendelson, Special Agent, Office of Naval Intelligence, Department of Navy, Washington, D. C. and John L. Hahn and Joseph P. Conner, both Special Agents, 4th District Office of Special Investigations, Department of Air Force, Suitland Hall, Maryland, as witnesses for examination by the accused.

/s/ W. Windus
W. WINDUS
CDR, USNR

Enclosure ( )

[1] TRANSCRIPT OF PROCEEDINGS HELD

July 13-17, 1961 (pre-trial investigation)

U.S. Naval Station
Washington 25, D. C.
Thursday, 13 July 1961

The investigation met at 0930 this date.

PRESENT:

Lieutenant Colonel Vernon A. Peltzer, USMC, Investigating Officer, Commander Werner Windus, USNR, Appointed Defense Counsel, Lieutenant John J. Gregory, USNR, Assistant Defense Counsel, Commander Richard G. Augenblick, USN, Interested Party John Kendrick, Esquire, Individual Defense Counsel, and Joseph C. Browne, Reporter

IO: Gentlemen, these proceedings will now commence. Would the reporter please state his name for purposes of the record and my report.

REPORTER: Yes, sir. My name is Joseph C. Browne, civilian employee of the Potomac River Naval Command, sir.

IO: Thank you, Mr. Browne. I will now swear the reporter.

The reporter was sworn.

IO: This is a proceeding for further pretrial in the case of Commander Richard G. Augenblick, U. S. Navy, proceeding and convened pursuant to the appointing order of the Commandant, Potomac River Naval Command (prefixed to this record of proceedings marked "A") at the request of Commander Windus, counsel for the interested party.

* * * *

[5] DIRECT EXAMINATION

Questions by the Investigating Officer:

Q. Would you state your name and occupation, please.
A. Joseph P. Connor, Special Agent, Fourth District,

Office of Special Investigation, Detachment 401, Andrews Air Force Base, sir.

[6] IO: Let the record show that this witness is called on behalf of Commander Augenblick to pursue with whatever examination counsel may desire. Proceed, please.

Questions by the Individual Defense Counsel (Mr. Kendrick):

Q. Mr. Connor, how long have you been so assigned?

A. You mean as an agent, sir?

Q. Yes, sir, and first of all at Andrews?

A. Well, since January of this year.

Q. January? Do you recall the date of January, sir?

A. No, sir. I think it might have been around 28 December when I arrived from overseas on assignment.

Q. And prior to that time you had been overseas?

A. Yes, sir.

Q. Were you also with the OSI then?

A. Yes, sir, I have been OSI over twelve years.

Q. Are you a civilian, or a member of the armed forces, sir?

A. I am a member of the armed forces.

Q. And are you permitted to state your grade or rank?

A. No, sir, we are not, unless there are unusual circumstances, sir.

Q. Would you consider the appearance before an investigating officer incident to possible general court-martial as unusual enough to give us your grade or rank, sir?

A. Frankly, sir, yes, I would.

Q. Have you been informed of the purpose of your appearance this morning?

A. No, sir, only other than to appear as a witness for the defense counsel.

[7] Q. And you were so informed by a Commander Windus?

A. Correct, sir.

Q. Now we are inquiring into a matter involving an airman by the name of James O. Hodges, Jr., and a Commander Richard G. Augenblick. Can you tell us, sir, when you first came aware of any matter involving two individuals by that name?

A. Yes, sir, on 12 January of this year.

Q. And, sir, how did you become aware of any matter?

A. I was telephonically advised by the OSI Duty Agent at our District Headquarters, Suitand, Maryland, that the individual Hodges and a Commander Augenblick were in the custody of the Armed Forces Police after having been released from the Metropolitan Police.

Q. And where were you at the time that you were so advised?

A. At home, sir.

Q. And pursuant to that advise, what did you do?

A. I proceeded to the Naval Gun Factory, which was the location of the Armed Forces Police, and I contacted an Army Sergeant by the name of Shaffer who briefed me on what he had understood, heard, concerning the arrest or this incident, sir.

Q. And did he do that from notes, or did he give you an oral account of what he understood? Just how was it done, Mr. Connor?

A. Verbal account, and he informed me that all of his information was hearsay.

Q. And did he say the source of the hearsay?

A. I believe, as I recall, sir, it was a Metropolitan Police, someone in the Police Department.

Q. Did you concern yourself at that time as to who the person was and as to who in the Police Department advised him?

A. Yes, I asked for the name of the arresting officer and I asked for the name of the individuals. I asked where and when this incident allegedly occurred, and he supplied the information that had been formerly made [8] from some sort of an incident report that the Armed Forces Police maintain.

Q. And did you see this incident report at that time, or was this all verbal between you?

A. Right, sir, verbal. I did not bothe. to read the report. In fact, I believe it was in the process of being typed by another individual at the Armed Forces Police office.

Q. Now would you tell us, Mr. Connor, what occurred then after you had received this report from Sergeant—what's his name? Do you know how his name is spelled?

A. I believe it's S-h-e-f-f-e-r—Sheffer.

Q. And you say he was Army?

A. Right, sir.

Q. What did you do then, sir?

A. I asked the whereabouts and the disposition of the airman insofar as a member of the Air Force and I was told that he was present at the Armed Forces Police Station.

Q. And then?

A. I asked if the Commander was present. He said yes. I never saw him. The officer volunteered the information that he had notified the Office of Naval Intelligence with regard to the Commander.

Q. By "the officer," you mean the sergeant?

A. Right, the sergeant.

Q. And?

A. I waited for the arrival of the ONI agent Mr. Mendelson and another agent whose name I cannot recall.

Q. In other words, do I understand correctly that you just waited around the Armed Services Police Station until the OSI—strike that. You just waited around the Armed Services Police Station until the ONI Agents arrived, is that correct?

A. That is correct, sir.

[9] Q. And did you have any further discussion during this waiting period with any other individuals there at the Station?

A. No, sir.

Q. About how long did you wait, do you recall, before they arrived?

A. No, sir, I would have to rely on my memory and say approximately 30 minutes—40 minutes. I do recall getting to the point that I thought they should have been there sooner, that if they didn't arrive within a few minutes I was going to use one of the Armed Forces Policemen to act as a witness to enable interrogation of Airman Hodges. That was my sole purpose in waiting for an ONI Agent.

Q. In other words, to have another witness during the interrogation?

A. That's right.

Q. All right. And then they did arrive. What apparently occurred?

A. Since this was a little unusual—we had two branches of the service involved here—I preferred to talk only to the airman personnel involved, which is more or less a working agreement between the services. We elected to talk to the airman, Airman Hodges, first.

Q. Was this election made as a result of a discussion between you and the agent?

A. Right, sir, among the ONI Agent and myself. We decided "well, we might as well talk to the airman," because I intended to take him back to our office at Suitland.

Q. Was there any discussion about the fact that it would be easier to interrogate the airman, being an airman, and then interrogate the officer, being an officer?

A. I don't recall any, sir, other than the fact that the ONI Office is located at the same location of the Armed Forces Police—next door, and we usually by practice and procedure use our own office. But the comment was made by the ONI Agents that it would be nice to know [10] first hand from the airman what allegedly occurred prior to our departure, and I would say he obviously intended to interrogate or question the commander at that time. To this I agreed. The interrogation lasted about ten or fifteen minutes.

Q. May I interrupt you just a moment here?

A. Yes, sir.

Q. As regards learning first hand, so far as the information that you had at that time was concerned there were two individuals involved at the same time, is that correct?

A. That is correct.

Q. And in an alleged offense?

A. Right.

Q. Well, Mr. Connor, I am a bit puzzled by your language. Why was it thought that the airman would be able to give a more first hand account than the officer, sir?

A. Well, I will correct the record to read this way, sir: If I had departed immediately with the airman, leaving

the ONI Agents with the commander, they would have no direct knowledge as to whether he said things or as to what the airman said at that time, and they considered it a decided advantage, and I concurred. If you are going to interrogate someone you have to ascertain first some place where this happened or where it is alleged to have happened.

Q. And, sir, this couldn't have been done simultaneously?

A. Not by OSI policy. Oh, yes, it could have been, yes. In other words, I could have taken Airman Hodges into one interrogation room and the ONI Agents simultaneously could have interrogated the commander. That is correct, sir, this could have been done. They could have but they didn't, sir.

[11] Q. Was any thought given, in view of the fact that there were two different services involved, of interrogating them both at once, Mr. Connor, prior to respective representatives or by two representatives of the respective services?

A. Not by me, sir, no. I had no interest in what the commander would have said then or at a later date since the ONI representative was there for the Navy. Our procedure is that we exchange statements or reports of investigation.

Q. All right, sir, now having reached that decision what occurred then?

A. I interrogated Airman Hodges after first identifying myself as a Special Agent of the OSI.. After reading and explaining his rights under Article 31 of the Manual for Courts-Martial that self-incrimination was prohibited, informing him of the nature of the accusation or investigation. . .

Q. (interrupting) Now, sir, may I interrupt you there. You say you both read and explained this, sir?

A. No, I did.

Q. Yes?

A. In the presence of Agent Mendelson.

Q. And, Mr. Connor, how much of the—strike that. What exactly did you read to him?

A. I read him (a) through (d) of Article 31 verbatim and I explained to him that he did not have to

make any statements; that any statement he did make could be used against him in a court-martial or any other board of competent jurisdiction. I asked the airman if he understood those rights. He replied in the affirmative.

Q. And?

A. That was it.

[12] Q. Well, now, Mr. Connor, did he ask you any question as to what the possible consequence would be "if I was found guilty of the offenses alleged?" You have stated, I believe, that you told him what the nature of the charge was. Was there any question at that time by him as to what the possible consequences were, or did you inform him?

A. No, sir, there was not.

Q. Was that discussed at any time between you and Hodges?

A. Yes, sir, at a subsequent interrogation at the Fourth District OSI Headquarters, Suitland, Maryland.

Q. And what was that discussion? Do you recall, sir?

A. After Hodges executed this statement, wrote it, initialed it, corrected and signed it, under oath, he felt quite concerned as to what might be his future Air Force career—court-martial—board action, or what have we. I told him that I could not answer the question as OSI reaches no conclusions, makes no recommendations, and takes no action whatsoever as the main function. That's command function.

Q. I believe that you have stated that you are a member of the Armed Forces?

A. That is correct.

Q. And I assume that you are Air Force?

A. That is correct, sir.

Q. Do you yourself know what the possible penalty would be if he were found guilty of an offense?

A. Yes, sir, having been in the Air Force and having been familiar with this.

Q. Having been in the Air Force and having been in this work and your general familiarity with the Court of Military Justice and the Code?

A. Yes, sir.

[13] Q. And the Uniform Code of Military Justice?

A. Yes, sir. But as an individual agent I never take it upon myself to tell anyone, suspect or subject, that "you probably will get a court-martial or you will be discharged as undesirable." I don't feel that it's my position to do so. I know that I couldn't honestly so state to anyone. In other words, sir, I would be speaking for the base commander—and that I cannot do.

Q. I am not asking so much whether or not you tell them or what as to what probably will happen or what possibly could happen but rather—well, let's put it this way: "For the offense of Grand Larceny, for instance, you could get so many years, up to so many years, and could get what they call a BCD or UD, whatever it may be." Was that question asked of you as to what the penalty is to "what I might be subject if I were found guilty?"

A. Not to my recollection, sir.

Q. Nothing along that line was discussed?

A. No, sir.

Q. Now, to come back for a moment to the procedure at the Gun Factory, you have stated that you read and explained to this boy what his rights were under the Uniform Code?

A. That is correct, sir.

Q. Now you stated that you also stated the nature of the offense against him—the alleged offense, is that correct?

A. Correct, sir.

Q. And, sir, what did you state it was?

A. Sex offense, homosexuality.

Q. Well, now, sir, did you state it in just so many words "sex offense?"

A. Correct, sir.

[14] Q. Homosexuality?

A. Right, and that again being a procedure. Generally, if we say sex offense, we have to be more specific as to what type of sex offense, sir.

Q. Well, do you feel that he is entitled to know what sex offense is involved?

A. Yes, sir, I do.

Q. Well, sir, was there any statement made to him to the effect that "you are alleged to have committed a specific offense at such and such a time with such and such a person?" Or was it simply—to paraphrase your remarks—would it be correct that you simply said "Airman or Hodges," however you addressed him, "you are being investigated on the basis of suspected sex offenses, homosexuality?"

A. No, sir, he was specifically informed as to the date, the place and the nature of this homosexual act that I had in mind. For purposes of the interrogation I referred to it as an act of fellatio. He didn't seem to understand the definition or the meaning of "act of fellatio." So then I told him, in the other language that is commonly referred to, "a blow job", that he was a passive partner in this act when this act occurred on 12 January 1961, in an automobile, and the approximate location.

Q. Now that was, of course, all told to him by way of warning in connection with the reading and explanation of Article 31?

A. That is correct.

Q. And after you explained that to him, what did you state to him, sir?

A. I asked him if he would, in his own words, relate the events that took place that evening, starting from the time that he left his base—Andrews Air Force Base—for town, which he did.

[15] Q. In what area of the building was this confrontation taking place?

A. It was, as I understood it, an interrogation room of the ONI Detachment here, sir, at the Gun Factory.

Q. An interrogation room?

A. Yes, sir. I mean that was my understanding.

Q. And wonder if you could describe the physical layout of the room? Was it a room say as large as this one (indicating), or smaller?

A. No, sir, it was much smaller than this. I guess I would just have to guess maybe—no, I am afraid I can't guess the size of the room, sir.

Q. Well, do you have similar rooms at Suitland for these purposes?

A. Yes, out at Andrews.

Q. And it is a similar room to the type that you have at Suitland for instance?

A. That's correct, sir, and maybe 12 by 14 feet or somewhere in that vicinity.

Q. And then after you told him that you wanted him to tell you, in his own words, what occurred on that evening, did he immediately tell you or was there any hesitation on his part?

A. No, sir, he proceeded to relate all of the events including the incident in the automobile in regard to homosexual act. Only once or twice did I have to ask him specifically what act did he do or did the commander allegedly do and how much assistance was rendered by Hodges or if it wasn't Hodges' idea in the first place, and a few other pertinent questions, which he answered without any hesitation whatsoever.

Q. Tell, Mr. Connor, during the course of the interrogation which allegedly took place in the car did he say to you that "He foundled my penis and he continued to fondle it until it became erect?"

[16] Q. Did he use that language, sir?

A. Yes, sir, he did.

Q. He did?

A. Yes, he used "fondled" and "played with" or something. So I asked him if he couldn't qualify that "played with him", or just what did he mean.

Q. Well, now, isn't it a fact, Mr. Connor—and think this over carefully and state this completely—that the language that was later used in the report which was signed by this boy was almost entirely dictated by you?

A. No, sir, it was not. This particular individual, as with any other individual, I told him it is customary if he wants to make a statement that he can have it typed or written longhand by the individual in question, or can be dictated or can be written by the agent. Airman Hodges elected to sit down and write in longhand his own statement, which, in fact, he did.

Q. And your testimony is then that the language that appeared in that report of "fondling my penis" "fondling it until it became erect" was the language that he, in this initial interview, at the Gun Factory, used?

A. That is correct, sir, yes.

Q. There was at no time that you said, quote, "Well, now, don't you think we had better use this instead of the other language?"

A. No, sir, the only guidance I gave Hodges in preparation of this statement was for him to be specific as to the date, time and place, and in detail just how he went about this.

Q. Was there any written report made by him or anything in writing at the Gun Factory itself?

A. No, sir, there was not.

[17] Q. And, sir, about how long did that interview take place?

A. I would say probably fifteen minutes, sir.

Q. And, Mr. Connor, present at that time was Hodges, yourself, and who else?

A. ONI Agent Mendelson.

Q. Sir, do you know what had happened to the other agent that you stated came with Mendelson?

A. No, sir, I don't.

Q. Did you ever see him again?

A. Not to my recollection, no, sir.

Q. And?

A. No, sir.

Q. You don't recall his name?

A. No, I don't.

Q. Yes?

A. No.

Q. Did Mendelson do any of the questioning at this interview—did he?

A. Yes, sir. As I recall, he asked a few pertinent questions as to "How was the individual dressed?" "Did he Hodges know the individual to be a member of the U. S. Navy?" "Did he know his rank?" And a few other questions along that category, and "Whether or not he could recognize this person again?" Just along that category, sir.

Q. And do you recall what the answers to those several questions were?

A. Oh, Hodges replied he couldn't recognize the individual and he described the automobile, described the at-

tire, the civilian clothing the commander was wearing—allegedly wearing—and he did not know his last name. He knew him as "Dick". He said the individual introduced himself as "Dick".

[18] Q. He didn't say that he knew he was in the Armed Services or the Navy specifically?

A. No, he didn't. He didn't say. If my recollection is correct, he did not say he was a member of the Armed Forces.

Q. Well, didn't you say that Mendelson asked him if he was?

A. Yes, and I believe the answer was "He didn't know."

Q. And that interview took about fifteen minutes, you say?

A. That is correct, sir—perhaps less.

Q. And then what occurred?

A. We left Airman Hodges sitting in the interrogation room while Mendelson and I departed. I told Mendelson at that time I would take Hodges to our office at Suitland, Maryland, and obtain these written statements, which at that time Hodges agreed that he would furnish to the OSI. Having no further need for Mendelson—having no further dealings with Agent Mendelson, having no further need for me or for me to be there, I departed, taking the airman with me. Mendelson said that he would proceed to interview the commander and, of course, a copy of the statements and the ONI reports would follow.

Q. Now did either of you take any notes during this interview at the Weapons Plant?

A. I took no notes.

Q. And do you recall what Mendelson did?

A. No, sir, in that respect I can't—I don't believe he did.

Q. When did you next communicate with Mendelson?

A. The same day—yes, the same day—to inform Mendelson that Hodges did furnish a signed statement at Suitland Hall and we would furnish that other in addition to the OSI reports and also inquired of Mendelson whether or not the ONI would interview the two police officers in regard to this incident, or did he prefer OSI to do it? He

said no he would interview the two police officers. I said, "Fine, that will be incorporated in your report to ONI."

[19] IO: May I interrupt here—he told you what?

A. He said he would interview the police officers and it would be incorporated in their ONI report investigation, which they gave to me.

IDC (continuing): And you did not talk to them at any time?

A. No, sir, I did not.

Q. Did you have any further connection with the case? Have you had any further connection with the case?

A. No, sir, other than the routine search conducted of Airman Hodges' personal effects located in the barracks, and which proved nothing, disclosed nothing, sir, pertinent to the investigation.

Q. And, Mr. Connor, what were you looking for?

A. Oh, names, addresses, letters, of a homosexual nature, like items that we could find.

Q. Nothing of that sort was so uncovered?

A. No it was not.

Q. Do you recall when it was approximately—the hour—that you arrived at the Weapons Plant?

A. Oh, this is just a guess, sir, but I would approximate it about 2 or 2:30—0200—0230.

Q. And do you recall approximately when you arrived at Suitland Hall?

A. Yes, sir, I can state, after refreshing my memory from the interview or interrogation, and it was 0430, or as near as I can maintain.

Q. You say you refreshed your recollection from the interview or interrogation?

A. Correct, sir.

Q. And, Mr. Connor, was this—when? When was this?

A. Today.

Q. Today?

A. Yes, from the log.

[20] Q. And that is an interview log that is maintained over there at . . .

A. (interposing) No, sir, I have it here.

Q. Oh, you have one with you in your hand?

A. If I have your permission to refer to it I can give you the precise time.

Q. That's the one in your lap there that you have been referring to?

A. Yes, sir.

Q. Certainly you may refer to it.

A. The person Hodges was reinterviewed in the interrogation room at 0430 hours.

Q. Mr. Connor, may I look at what you are looking at?

A. Yes, sir.

Q. Thank you.

A. Yes, sir, (handing).

IDC (Mr. Kendrick): Sir, would the Investigating Officer please indulge with me for just one moment, sir?

IO: Certainly, counsel.

IDC (Mr. Kendrick)—continuing: This appears to be a form which is a regular OSI form, is that correct?

A. That is correct, sir.

Q. And which is made up on each individual case?

A. That is correct, sir.

Q. I notice here, Mr. Connor, that the language is used—printed language—"Person interrogated." And then, sir, there is an alternative "did" or "did not" "request legal counsel" and in this instance the "did" is crossed out. And then in the language—leaving the language—[21] "Person interrogated did not request legal counsel." I will ask you, Mr. Connor, did you advise him that he was entitled to counsel?

A. No, sir, I did not.

Q. The matter did not come up I assume?

A. No, sir, and as OSI policy we have no requirement that we do.

Q. That you do?

A. Unless the subject or suspect would ask and request, and then we immediately terminate the proceedings and see that he gets a counsel.

Q. Did I understand that your testimony was that OSI policy is that we do not inform him of the right to counsel—that you do not, is that correct, sir?

A. That is correct, sir—we do not.

Q. Now was there anyone else present during this period, which your reports shows from "0430 to 0640" on that morning?

A. Yes, sir. The agent assigned to the interview log, sir, Agent Hahn.

Q. Oh, yes. He was present during the entire time?

A. That is correct, sir, and he maintained the Interview Log.

Q. I believe he is now in Japan, is that correct?

A. That's my understanding, sir—that's correct.

Q. Is that a permanent change of station?

A. I would imagine so, sir—yes.

Q. Was this "coffee break" at 0555 at his request?

A. I don't believe so; really can't recall.

Q. Is that also OSI policy that you suggest that we break for a period of refreshment, of relaxation, and so forth?

A. Yes, sir, that is procedure that we initially follow—that we stop interrogation, interviewing; we tell them that they can feel perfectly free to use the latrine, smoke if you care to, or take a break.

[22] Q. And when is that information given, Mr. Connor?

A. At the very outset of the interrogation.

Q. Now tell us, what took place betwen 4:30 and 4:45, which your report states "The time the interrogation began and ended."

A. 4:30 and 4:45?

Q. Yes, sir.

A. Without looking at the log again, sir, I really couldn't say.

Q. Mr. Connor, I don't think it will help you but here it is (handing).

A. As I remember apparently, 0430 was when it began, and the time it concluded was 0445. And, sir, that was nothing other than a verbal reiteration of what Airman Hodges had told me in the presence of Mendelson for the benefit of Agent Hahn, who was the OSI Duty Agent and absolutely had no knowledge of this other than notifying me that the Armed Services Police had apprehended this fellow.

IO: One moment, Mr. Kendrick. I would like the record to show that in answering the preceding question the witness Mr. Connor referred to—what is the name of this piece of paper that you have in your hand, sir?

A. Interrogation Log.

IO: Yes, the witness Mr. Connor referred to the Interrogation Log. Proceed.

IDC (Mr. Kendrick): However, Mr. Connor, there is nothing on that Log that says "a reiteration" or anything. It just say "0430".

A. No, it says "Time concluded". And that meant the time that the verbal interrogation or interview was concluded. Then it says "Writing of statement commenced at . . ." Shortly after the verbal reiteration or account he commenced to write it, sir, and this was concluded at 0620. This was in, in handwriting, longhand of Hodges, by Hodges. "The person interrogated completed reading the statement at 0630 and signed it at 0631." Nat-
[23] urally, sir, Hodges had a few statements to make or comments to make while writing this out: "Is it necessary that I name my girl friend?" I said no. A few things like that, sir.

Q. Well, Mr. Connor; there is no reference to a girl friend is there?

A. Well, yes, sir, I recall he said that he was out that evening with a girl friend and previously had returned her to some Nursing School here in the D. C. area, and that's how he arrived at 11th and Pennsylvania to take a bus back to Andrews.

Q. Now you spoke of Hahn as being a duty agent?

A. Yes, he was a special agent on duty 24 hours at the Headquarters, OSI.

Q. And he was your supervisor I assume?

A. No, sir, he was just another agent but I was the duty agent from Air Force Base Andrews. The main difference being that the duty agent at Andrews Air Force Base does not in fact report to the scene of the incident and answer the calls. Hahn's activity was more or less just applicable or described as that of a CQ. If there is any need for an agent to depart from the District Headquarters Hahn would telephonically advise them to do so while he remined at Suitland in a CQ category.

Q. Well, was this additional interrogation at Suitland also for the purpose of establishing a record that would be later subject to verification by you all of the statements made orally?

A. Correct, sir. And I thought that perhaps he wouldn't care to furnish a written statement.

Q. And so that a recording was made at that time of his statements to you at Suitland?

A. No, sir.

Q. And in the presence of Hahn?

A. None other than mental notes.

[24] Q. No record?

A. No.

Q. Well, now, when I spoke of a record a moment ago I meant a recording—some type of an electronic recording?

A. No, sir, no recording.

Q. Well, now, aren't these interview rooms set up for the purpose of making recordings of an interview between suspect and the agent?

A. They can be—yes, sir.

Q. And isn't that the customary procedure to have such a set up?

A. Well, not with the Office of Special Investigation. As a matter of fact, this interrogation of Hodges by the OSI at Suitland occurred not in an interrogation room. We just decided to use the Main Office, which is twice the size of this room here, which during normal duties hours is shared by agents and secretaries.

Q. So that there was no electronic recording at all made of Hodges' statements?

A. No, sir, there was none.

Q. Well, Mr. Connor, was there any type of manual stenographic record made?

A. No, sir.

Q. And so that all that there was was an oral statement made by you—strike that. An oral statement made by Hodges to you at the Weapons Plant followed the statement made again by Hodges to you and Hahn during this roughly 15 minute interview at Suitland and then a reproduction to writing, reduction to writing by Hodges?

A. That is correct, sir. I have no way of knowing whether the initial interview was recorded or not.

[25] Q. Well, did Mendelson assure you that he did have a record of it that could be used later if there were any diversions?

A. No, sir, he didn't.

Q. He did not?

A. No.

Q. Well, Mr. Connor, isn't it a fact that the reason no notes were taken at the Weapons Plant was because it was known that it was being recorded at the time of the interview?

A. I have no direct knowledge of that.

Q. Well, any indirect knowledge?

A. Well, other than the fact that—as you put it—one might assume an interrogation room in an organization investigating is wired for sound—yes, sir.

Q. But you do not know independently of your own knowledge that was done in the room?

A. No, sir, I have no direct knowledge. I have never seen the recording, have never heard it.

Q. Mr. Connor, to come back for a moment to this statement by Hodges as to what the possible affect of his Air Force career would be, don't you recall stating at some point in your interrogation of him that "he could get as much as 20 years for this offense?"

A. No, sir, definitely not.

Q. Mr. Connor, if Hodges made that statement would you deny it? Would you deny, sir, that that statement was true, sir?

A. Definitely, sir.

Q. Was there—and search your mind carefully if you will—any discussion as to what possible affects there might be?

A. None other than that he stood a chance of being separated from the Air Force.

[26] Q. Well, that was the statement by you. Did you just say "Son, you stand an excellent chance of being separated from the Air Force?"

A. As I recall, sir, he said "Could I stay in the Air Force?" And I replied "Yes, it's possible." "It's possible

you will be discharged." "Its possible you could be court-martialed."

Q. Did you state under what possibility he might stay in?

A. No, sir, I did not go into that other than to qualify the statements that he Hodges would be given an opportunity to see a Board of Inquiry concerning his Air Force career, or court-martial for that matter, as I reiterated from the Manual for Courts-Martial.

Q. Well, now, as I understand you, initially there was no discussion of this, and now, Mr. Connor, as we inquire a little bit further undoubtedly your memory becomes clearer. You stated there was a possibility that he might be retained; that he might be court-martialed; that he might appear before a board. Is that corret, Mr. Connor?

A. That is it, sir.

Q. Did you state any other possibility?

A. No, sir, that's it. In fact, I informed him that OSI has nothing to do with his final disposition.

Q. Yes, but he knew that you were in the Air Force; that you were obviously an adult; that you were in this investigating business. During this 15 or 20 minute ride from the Weapons Plant down to Suitland, what did you all discuss during that trip, Mr. Connor.

A. Very little.

Q. Yes?

A. Very little.

Q. Well, Mr. Connor, I did not ask for the quantum but what?

A. Well, first he wanted to know if we were going to Andrews Air Force Base.

[27] Q. Yes?

A. Since I had introduced myself as an agent from there. I told him, "No, we are going to the OSI Headquarters, Suitland. Aside from that, nothing, because I won't permit anyone to discuss an incident between myself and a subject or suspect in any case.

Q. Well, Mr. Connor, your function is essentially to get information, is that correct?

A. That is correct, sir.

Q. Wouldn't you utilize this drive through the dark of the night, in the early morning, Mr. Connor, to elicit any information which might help your job?

A. No, sir. In this particular incident I did not believe that he could furnish any, and what he had furnished or what he might have furnished I really wouldn't need, sir.

Q. Well, you still had to make the search of his personal effects—hadn't you? That is, you still had that to do, didn't you?

A. Yes, sir, that is correct.

Q. So that you might get some possible knowledge by way of discussion that would aid you in the places that you might search or something of that sort?

A. No.

Q. Isn't that right now?

A. Perhaps that's true but we just search, with the base commander's permission, the immediate area, automobile of the person, and billet.

Q. So, sir, there was no discussion of other than "we are going to Suitland," and not to an Andrews Air Force Base, is that correct?

A. That is about correct, sir, to the best of my knowledge and belief.

Q. Now, sir, during the interrogation at Suitland, before he was turned loose on the statement, did Hahn participate in the questioning of him at all?

A. Very little, sir.

[28] Q. Do you recall what he did while you were questioning him?

A. No, sir, I do not.

Q. Could it have been Hahn who stated "Look, here, boy, do you know that you could get 20 years for this?"

A. To the best of my recollection, no one ever informed him Hodges that he could get 20 years or any time.

Q. So that any statement to that effect by him you would deny completely?

A. Yes, sir, definitely.

Q. Well, now, in the discussion about a "board" "court" or some type of administration—administrative

action, was there any time that he asked you "Well, suppose I did go before a court, what would be the result? What would be the result if I was found guilty?"

A. I believe he raised those questions, sir, as to what happens if he went to a board or court, and I told him "I can't say, I want to be perfectly honest with you. I don't know." "And that's the best answer that I can give you. I don't know."

Q. Well, you know, do you not, something about the policy of the Air Force, something of what sentences have been or disposition of cases. Did you indicate to him "Well, in the case of so and so, this happened . . .?"

A. No, sir.

Q. "But on the other hand, in the case of somebody else, the other happened?"

A. No, sir, I conducted no discussion as to what could possibly happen to him and Hodges other than the court or the board routine procedure.

Q. Mr. Connor, during this coffee break at 0555, was there any food served or offered?

A. No, sir.

[29] Q. Do you know whether or not he was given any food or other refreshments or anything from the time that he arrived at the ONI Headquarters to the time that you had a coffee break at Suitland?

A. To the best of my knowledge, he had nothing, sir—nothing.

Q. Now did you personally turn him over to his First Sergeant?

A. That is correct, sir.

Q. At that time, did you furnish the sergeant or the commanding officer of the squadron with a copy or any indication of what this report showed?

A. Yes, sir, I showed the First Sergeant the handwritten statement of Hodges' from which he could brief the commanding officer.

Q. You showed it to him you say?

A. Yes.

Q. But you did not give him a copy of it did you?

A. No, sir, I had only the original, which I kept.

Q. Now, then, sir, later in the day you stated that you indicated with—strike that. Later in the day you stated

that you communicated with Mr. Mendelson and told him that you had gotten a statement from Hodges and you also discussed this matter of interrogation of one or two civilian police. What physical arrangements were made to get the copy of Hodges' statement to Mendelson?

A. He asked to have the statement as expeditiously as possible and I had it reproduced at Suitland Hall. Someone at Suitland Hall either hand carried it or forwarded it somehow to ONI Agent Mendelson—that is, sir, photostatic copies of Hodges' statement.

Q. Were you in turn supplied with any copies of any police statement?

A. No, sir, we received nothing other than the ONI report of the investigation.

[30] Q. The ONI report?

A. Right, and which contained the interviews with the police officers, as I recall it.

Q. Well, now was that a paraphrased account by ONI of the interviews, or were you actually given copies of the police statements?

A. I took it to be a paraphrased results, or this is what the officer's interview shows, a summary, that is what occurred.

Q. Do you have those with you?

A. No, sir, I don't. I have my OSI report on the investigation, which reads "no further investigation" inasmuch as ONI was handling the thing, and when I received the ONI report again it was marked "CLOSED", and the copies of the report were forwarded to the Action Commander at Andrews.

Q. Do you have the date that that was forwarded to the Action Commander, and sir, who would the Action Commander be?

A. I don't have the dates. But the Action Commander in this case would be the Commander, Andrews Air Force Base.

Q. Colonel Smith?

A. General—right, sir.

Q. I mean, General Smith?

A. Yes, sir. Down to Hodges' immediate commander, who after consulting with the JAG, et cetera, takes the appropriate action.

Q. Tell me, did this man's immediate commander ever discuss this matter with you?

A. Yes, sir, and not that day but I believe a couple of days later. I happened to be in there and he asked me a routine question: "What is the status of the Hodges' case?" And I told him we had completed all of the OSI investigation and was just awaiting the results of the ONI investigation and that I would see that he got such a report.

[31] Q. And that is as best you can recall, a couple or so days after?

A. Right.

Q. Perhaps I interrupted your search of your file there on the date of the forwarding to the action personnell—the action commander.

A. Well, we wouldn't have that, sir. My case here was forwarded on 31 January, and the ONI reporters were not attached, so I assume they came in at a later date, shortly thereafter.

Q. Well, sir, do you recall forwarding them as a supplement to this report that you have in your hand?

A. Yes, sir, I recall dictating a letter to the stenographer forwarding two copies of the ONI report re: Hodges.

Q. Now so that we will know more or less the chain of command, Mr. Connor, sir, your report, which is a copy of what you have here, is forwarded directly by you, is that correct, to the base commander?

A. No sir, it is originally approved—forwarded out—written approval by Colonel John W. Gaffney, District Commander, Fourth District, OSI, and from there it is put in for approval by Commander, Air Force Base Commander Andrews. I can't state whether they forward it directly to Major Best, who is now Director of Law Enforcement Security, or I believe they do, and he forwards it on to the interested commander or the unit commander, sir, or not.

Q. Did you have any further discussion with the Squadron Commander Major Haffer?

A. No, sir, I did not.

Q. And after your action in forwarding this supplemental, which were the two reports for ONI, did you have any further contact with the case?

A. No, sir, other than a few phone calls, as I recall, from either the first sergeant or Major Haffer himself wondering where the ONI report was and whether or not OSI or I contemplated any further investigation. I believe [32] he even called as to the disposition of the report. I referred him to the proper people who were in command, through command channels.

Q. What do you mean "disposition of the report?"

A. I believe Major Haffer called and said that he had received no OSI report nor had he received any ONI report, so I referred him to the Director of Law Enforcement Security, Security Division, who no doubt had the report.

Q. When approximately was this, do you recall?

A. I haven't the slightest idea, sir.

Q. Would it have been as long as a month after?

A. This could have been, yes, sir.

Q. But you have, Mr. Connor, no independent recollection of it?

A. None, sir. When we forward it we ask by letter of transmittal any action taken against an individual. I haven't received any notification as of this date.

Q. Do you know what the status of the case is?

A. Only the OSI report marked "CLOSED", sir.

Q. No, but I mean the status of the individual?

A. No, sir, I have none.

Q. Well, now, I understood you to say—and the reporter will have to refresh my recollection—that is, as to what Mr. Connor did say as regard the status, with regard to the status of this individual.

A. All right.

IDC (Mr. Kendrick): Request the reporter read back the last three or four questions.

The reporter did as directed.

IDC (Mr. Kendrick)—continuing: Thank you. Now, Mr. Connor, do you know what action the Air Force or the Base has taken with regard to this individual?

A. No, sir, I do not.

[33] Q. And, Mr. Connor, you do not have any idea?

A. No, idea.

Q. The papers that you referred to as the OSI report, copies of which you have there in your hand (pointing) and to which you referred to to refresh your memory and recollection a moment ago, may I examine those, sir?

A. (Closing folder) Sir, it has to clear with the District Commander and the Staff Judge Advocate, and it is OSI procedure not to release reports of investigation.

Q. Very well. Let the record show that the witness did not allow those documents to be examined.

A. I can't, sir.

IDC (Mr. Kendrick): May we take about a five minute recess, Mr. Investigating Officer?

IO: Very well, we shall recess for five minutes.

The investigation recessed at 1050, 13 July 1961.

The investigation was called to order at 1055, 13 July 1961.

IO: Mr. Reporter, let the record show that all parties present when we recessed are now present. The witness is on the stand and reminded that his previous oath is still binding. Proceed, counsel.

DIRECT EXAMINATION (cont'd)

Questions by the Appointed Defense Counsel (Cdr Windus):

Q. Mr. Connor, sir, you stated that Hodges wrote out a statement in his own handwriting and signed it. Did you witness it? I believe you did witness it, he took an oath on it, and it was also witnessed by an Agent Hahn. Is that correct, Mr. Connor?

A. That's correct.

Q. Yes?

A. That is correct, sir, yes.

Q. Was there any other statement written by Hodges that is a typewritten one, or, Mr. Connor, is that the only statement, sir, reduced to writing?

A. Sir?

[34] Q. Yes?

A. That is correct, sir. I had that original statement here.

DC (Cdr Windus): Mr. Investigating Officer, bear with counsel just a moment please, sir.

There was a brief discussion between the Interested Party, Appointed Defense Counsel, and Individual Defense Counsel, out of the hearing of the Investigating Officer.

IO: Counsel, may I interject here: If you would like to recess, fine.

IDC: Sir, I think we will be finished with this witness in just a little while, sir.

DC (Cdr Windus)—continuing: Well, Mr. Connor, let me ask you this—you gave a copy of that handwritten statement of Hodges' to ONI, did you not?

A. Yes, sir, it was forwarded by someone in the District Headquarters.

Q. A photostatic copy or something of that sort?

A. Right. I retained the original in the Hodges' case file.

Q. Sir, that's what I mean, you retained the original?

A. Yes, sir.

IO: I would like to ask some questions, counsel. Would counsel rather take a break first. However, I don't think I have many questions.

DC: No, sir, we may as well go ahead and finish now with this witness.

IO: Very well, counsel, if you would rather finish with this witness first.

CROSS-EXAMINATION

Questions by the Investigating Officer (Lt Col Peltzer):

Q. Mr. Connor, there has been some reference to discussion of things that might have happened to Hodges, whether or not there was a conversation between you and

Hodges as to what might ultimately happen to him as a result of being involved in this particular event of which he and Commander Augenblick were suspected. Referring you to that discussion, Mr. Connor, who brought up the [35] discussion? Did you, Mr. Connor, bring up the discussion, or did Hodges bring up the discussion?

A. Hodges mentioned it as being quite concerned.

Q. Did you discuss anything specifically with him that could follow from possible involvement in this, or did you just discuss general alternatives, sir, that could occur?

A. Just in generalities, sir.

Q. Mr. Connor, leaving that subject and directing your attention to the "trip to Suitland in the car"—as I recall, your testimony was the only thing that you said or the only discussion that took place was regards whether you were going to Andrews or whether you were going to Suitland. Now you inferred that, and I believe your reply was that nothing else was discussed. Now, Mr. Connor, I will ask you, are you stating affirmatively nothing else was discussed, or that you don't recall any other discussion of significance?

A. Nothing else was discussed, sir.

Q. You mean just flatly there was no other discussion; that there was silence throughout the trip. Is that correct?

A. To the best of my recollection, sir, yes.

Q. All right. After arriving at Suitland, Mr. Connor, was there any further occasion for reminding Hodges about his rights under Article 31, or anything like that, prior to this second verbal interview or prior to the writing?

A. Yes, sir, he was again read and explained Article 31 by me in the manner previously described.

Q. And, sir, this was before the second verbal interview?

A. Right, sir.

Q. Who made the statements during the second verbal interview? Did you? Did you recapitulate what had transpired over at the Gun Factory, or did he recapitulate?

A. He did, sir.

[36] Q. And he had been reminded of his rights again generally in the same manner that you previously advised him again?

A. Right, sir, and specifically in the same manner but in the presence of OSI Agent Hahn.

Q. Was the other time—the first time—in the presence of Mendelson?

A. Right, sir.

Q. Then I take it no further advise was given to him in connection with executing the written statement that he wrote out in his own handwriting?

A. No, sir, it was covered in the same.

Q. All right. Mr. Connor, did Hodges at any time ask to go home or to leave the building?

A. No, sir, he did not.

Q. Did he indicate that he was tired verbally?

A. No, sir, not to me.

Q. Did he appear tired or fatigued?

A. No, sir, he didn't.

Q. Did he look frightened?

A. Well, I would say that he looked a little bit concerned.

Q. He looked concerned?

A. Yes, sir.

Q. Anxious?

A. Right, sir.

Q. If you have some other word to describe his emotional set up why you use your own words. I am only using words merely to suggest ideas, train of thought, and I am not trying to have my words documented particularly. However, Mr. Connor, Hodges did not ask to go home? He did not? Did he ask to go home?

A. No, sir, he did not.

[37] Q. Did he make any verbal statement that he was tired or fatigued or that he wanted to be let alone or anything of that nature?

A. No, sir, he didn't. As a matter of fact, he appeared cooperative.

Q. He was cooperative?

A. Right, sir.

Q. Was he discussing the information, coming forth with it, or did you have to kind of extract the informa-

tion from him, or was there some other type of interview of this man Hodges?

A. I would say he was volunterring a considerable volume of information and was very cooperative at the ONI office and at the OSI office.

Q. Did you have to direct his attention to particular areas and particular points that he omitted that you wanted covered?

A. That is correct.

Q. I see. And then, Mr. Connor, he would go on spontaneously?

A. Right.

Q. Did he say that he was hungry at any time? Was he?

A. No. sir.

Q. Did he ask to get some sleep at any time? Was he sleepy, sir?

A. No, sir.

Q. Now with respect to counsel, did Hodges interject anything concerning counsel into your discussion at any time?

A. No, sir, he did not.

Q. Mr. Connor, did you interject anything concerning counsel into the discussion at any time?

A. No, sir.

Q. Did I understand correct the OSI policy concerning counsel is that it is not to be voluntarily interjected into the discussion with the subject or suspect?

A. (pause)

Q. Yes? What is your answer "no?"

A. That is correct; yes.

Q. Yes?

A. Yes, sir.

[38] Q. By the operative or the interrogator interviewing?

A. That is correct, sir.

Q. Counsel is only to be discussed if the individual raises the question?

A. Right, sir.

Q. Where did the word, Mr. Connor, "fondle" come from? Who originated this? Did you first use this word

when he was describing "playing" or describing other events, or did he use the word first, sir. I mean, for example, did he describe something and then you said, "Well, do you mean he fondled your penis?" or something like that?

A. To the best of my recollection, sir, he used it. He used the word "playing with me" and I injected "Well, what do you mean by that—just what do you mean by that?" "Well, rubbing with his hand and fondled me."

IO: Counsel, I must confess that I injected the word "penis" into this. It is the first time, sirs, that it has been mentioned. I know nothing particularly about this case. But these type of cases frequently run in that vein and that is where the word originated with me—"penis". I was more concerned more with clarifying what I had said then I was with listening to your answer, Mr. Connor. I will proceed with my questioning.

Who was the source of the word "fondled"?

A. Hodges, sir.

Q. Hodges was the source of the word "fondled"?

A. Right.

Q. Sir, his general conversation—did he appear to have a fairly good education? Were there a lot of "dese" "dose" "dats" "dis" and "dat", or was his grammer, Mr. Connor, good?

A. No, sir, I would judge him to be of average.

Q. Did it strike you as odd that he used the word "fondled"?

A. No, sir, it did not.

Q. Sir?

A. (smiling)

[39] Q. Yes?

IDC: What was that?

A. No, sir, it did not.

IO (continuing): How old would you estimate Hodges to be?

A. Twenty.

Q. Do you know exactly how old he is from any particular source?

A. No, sir, and if my recollection is correct, I believe he was born in '41.

Q. You don't know how much education he has had?

A. No, sir. I can't recall, sir. I did at one time. I did at one time, when I reviewed his records.

* * * *

[42] The Pretrial Investigation opened at 1111, 13 July 1961.

* * * *

DIRECT EXAMINATION

Questions by the IO:

Q. State your name, rank—well, let me state it for you. You are William G. Mendelson, Special Agent, Office of Naval Intelligence, Department of Navy, Washintgon, D. C., is that correct?

A. I'm currently attached to the District Intelligence Office, Fifth Naval District.

* * * *

[47] Q. So that . . . .

A. It wasn't necessary for me to get in touch with Round or Pickeral to decide how I had done this.

Q. And it not only was not necessary, but you did not communicate with them?

A. I absolutely did not communicate with them—either officer. In fact, I haven't seen Pickeral since the time that I took the statement from him. I have never seen Officer Pickeral.

Q. Now, I'm not sure, Mr. Mendelson, there was some question and answer regarding this, but I'm not sure exactly where this initial interview with the Airman took place so far as this physical layout of the Gun Factory is concerned. Would you tell us?

A. Yes, I can. The actual interview with Airman Hodges took place in a room, and I think it's on the second floor of the Intelligence Office at the Potomac River Naval Command. It was the same room that I discussed the same matter with Commander Augenblick a short time later.

Q. And you had mentioned previously of going from one building to the other, and that's what has confused me I think.

A. What building . . . .

Q. What building was it that you came into and into which you went?

A. There was a building, I believe, right next—I can't give you the numbers of them, but there's an Armed Forces Police Office in a brick building right close by to the building in which the Intelligence Office is located. Now whether it actually is joined—I haven't been back there to this day; I can't say whether it adjoins it or whether it a few feet down the street; I do believe that the Armed Forces Police use the same parking spaces as the people in that building. But I do know it was necessary for me to leave the Armed Forces Police Office and go outside and walk up some stairs to the second floor of the building in which the interview took place.

[48] Q. Can you tell me what it was necessary—the two individuals were already in the one building, were they not—in the Armed Services Police Station?

A. Yes, sir, but as I say, that was separated from the building in which the interview took place.

Q. Right.

A. So I had to leave that office to go to where the interview was to take place.

Q. And this you say was on the second floor of the Intelligence Office?

A. Well, it was the second floor—a brick building in which the Intelligence Office is located. I don't know exactly what is on the first floor of that building, but I do know that it was necessary for me to come outside and walk up the front stairs and go up the stairs leading into the front door.

Q. Can you describe this room for us?

A. Well, I'd say it was about 10 by 12 or 12 by 14 feet in dimension; I believe it had a desk, a chair on each side. I don't think I've ever been it again and I really can't recall exactly if it had any other furniture in or not.

Q. Well, now when you went to that room, I believe you referred to it before as an Interview Room?

A. Interview room, yes.

Q. Is there something particular about your use of the word "Interview Room" as opposed to any other room?

A. Yes, sir, there is.

Q. And what is that?

A. It's not in an open area such as this room here.

Q. And, were you accompanied to that room by Mr. Connor?

A. I believe Connor and I went to that room together, yes, sir, because he intended to interview Airman Hodges and I did accompany him to that room.

Q. Now, who conducted . . . strike that. Who was interviewed first?

A. Airman Hodges was the original interviewee.

[49] Q. And who conducted that interview?

A. Mr. Connor conducted that interview.

Q. And do you recall how the interview was commenced?

A. Yes, I believe Connor—do you want the physical arrangement of the proceedings and so forth?

Q. Well, if you can recall that, and what was said, and who said it, and so on.

A. Airman Hodges was asked to come in—or perhaps he had come in—I'm not certain at this point whether he actually accompanied Connor down there or whether he was up in the corridor and was then asked to come back down. At any rate, he came in, sat down; he was advised of the nature of the investigation; he was warned of his rights under Article 31, Uniform Code of Military Justice.

Q. Connor did this?

A. Connor did all of this, yes, sir.

Q. Do you recall him—or in what way he advised him or warned him?

A. Well, he advised him verbally and I believe he—I don't recall whether he actually read Article 31 to the man; he dwelt at great length on the man's rights under this Article and the man did indicate that he understood his rights after Connor got through.

Q. And was any identification made as to who you were?

A. Yes, I was introduced by Connor after he had introduced himself. I was introduced by Connor as a Special Agent from the Naval Intelligence Office.

Q. And then what occurred?

A. Connor then proceeded to ask him—Airman Hodges—questions concerning the incident of that evening.

Q. And was there any other representative of ONI there at that time?

A. No, sir.

Q. You had been accompanied to the building by another agent, isn't that correct?

[50] A. Yes, sir.

Q. What happened to him?

A. He was the one that had made—I think they call him the Duty Agent—or at least he was assigned to come down there and open the place up so that we could get in and use one of those interview rooms, but he was not present at the time of either one of the interviews.

Q. And about how long did that take place?

A. The interview?

Q. Yes.

A. With Hodges?

Q. Yes.

A. I'd say not over 15 minutes.

Q. And then he was released into the custody of Connor?

A. Well, Connor took him away. I don't know whether he was released or not. We just said goodbye and that was it.

Q. Now, have you seen the statement that Hodges later prepared for the OSI?

A. Yes, I saw it.

Q. Do you recall generally the language in that statement?

A. Generally speaking I'd say the statement conformed to what he had told us I believe at the time of his interview.

Q. Do you recall his using in the statement that he gave to you orally there in the Intelligence Interview Room, using the language such as "fondling his penis, an erect penis"?

A. Yes, I do recall that.

Q. You do recall his using the word "fondle"?

A. I'm recollecting this now. I can't say that he said "fondle or played with". It was definitely an indication of one or the other.

Q. Well, was there any time that either you or Mr. Connor said, "Well, what you're referring to is fondling."?

A. Well, I never did say that. What Connor said, I can't recall at this time.

[51] Q. You don't recall any supply of language of that sort?

A. No, sir. The man was extremely cooperative and it was not difficult for Connor to solicit information from him.

Q. In picturing back again, I'm asking you to make a mental image of the interview. Do you recall his use of what might be considered somewhat technical terms such as "erect penis" and "penis", "fondling penis"?

A. Yes, I think he did use them—I know he used the word "penis". I do know that, and I know the connotation which you refer to.

Q. And you know what? I'm sorry.

A. I said I can recall, not the exact language—I don't know how important this is to you—but I cannot recall the exact quote by Hodges, but I do know that he did use the word "penis" and that it was referred to by him in connection with this alleged act that took place.

Q. And do you recall any questioning that you yourself did of Hodges?

A. No I didn't. I left most of the questioning to Connor. I may have asked him a couple of questions, but we don't usually break in on another man's interview. I may have asked him a couple of questions because I did, as I think I mentioned before, I did jot down a couple of rough notes at the time.

Q. And I assume that you made a recording of this that you could refer to so as to be certain as to these aspects, isn't that correct?

A. No, I'm not certain that we had any recording. I do recall that the information that was given at this interview was later more or less typed up in—you might say a memo report from my own information just setting down such things as what time I was called, what time I arrived there, and what Hodges said. But in putting down what Hodges said, I used Navy terminology briefly,

which would not—in other words it wasn't verbatim—of what Hodges said, in my little memo.

Q. Well, now, Mr. Mendelson, these interview rooms are set up as such so that recordings may be made of the interview of an interviewee, isn't that correct?

[52] A. Yes, sir.

Q. And is it also correct that an electronic or some sort of mechanical recording was made of this interview?

A. I'm not sure that an electronic or a recording was made of this interview. There was a recording made of my interview with Commander Augenblick.

Q. And that was in the same room which you had interviewed Hodges, isn't that correct?

A. Yes, sir.

Q. And the reason that you used that room for initially the interview of Hodges and subsequently the interview of Commander Augenblick was so that it may be recorded, isn't that correct?

A. Not necessarily. We don't record every interview we make, but we can—we use them because we can if feel it's necessary.

Q. Well, now, you know definitely that a recording was made of Commander Augenblick's?

A. I do.

Q. With reference to his interview?

A. I do.

Q. Do you know whether or not it was made of Hodges'?

A. I can't recall right now if it was. It might very well have been, but I don't have . . . .

Q. The likelihood is that it was, was it not?

A. No, the reason that I can't recall whether it was is because we had, we felt, two witnesses to any statement that Mr. Hodges may have made and therefore we may not have recorded Hodges' testimony at that time figuring that the statement and the two agents would be corroborating enough.

Q. Well, now, how can this be determined?

A. Well, I can only make a check on it and find out.

Q. Could that be done now?

A. I think so. I could probably make a telephone call

[53] back to the office over there and find out whether or . . . .

Q. Don't you recall of your own independent recollection, Mr. Mendelson?

A. I honestly don't. As I say, the reason I don't recall that was because I don't have it, as I do have the recording in the case of Commander Augenblick, and this was a verbal interview of—where no statement, no written statement at that time was taken, and we felt that . . . . Connor said he would pre-interview Hodges and later on supply me with a written statement.

Q. Who operates the device while the recording is being made?

A. One of the other Special Agents operated it—the Special Agent who made arrangements for me to use the Interview Room.

Q. And it was he—I'm sorry.

A. In another area there—another room. Undoubtedly he's the one, I'm sure he's the one.

Q. Well, he is the same one who opened the place up—made it available for you, was he not?

A. Indeed he was.

Q. And isn't it a fact that he was the one that turned it on or monitored it?

A. If it was done, he would be the one to have done it, yes.

Q. And isn't it a fact, Mr. Mendelson, that the reason you left the Armed Services Police Headquarters and went to this Interview Room on the second floor of this particular building was for the purpose of doing just that, isn't that correct?

A. The purpose of going to the second floor of the building was to interview Commander Augenblick and Airman Hodges in a private atmosphere—in an Interview Room, and it would not necessarily have been recorded unless I decided that I felt it was necessary to record it. But the primary purpose, of course, is the same as you taking a client into your conference room to have a conference with him, and these Interview Rooms are conference rooms, you might say. They're quiet and we will not be disturbed.

[54] Q. And they're all equipped for electronic or other type of mechanical recording?

A. I couldn't say whether they're all equipped that way. Some of them are.

Q. But you have no independent recollection of whether one was done with regard to Hodges?

A. No, I do not.

Q. If you will indulge me just a second (confers with Commander Windus, the appointed defense counsel).

Q. What is this other agent's name?

A. Special Agent Lou James.

Q. Lou James?

A. That's right.

Q. Is he still on duty at the PRNC?

A. As far as I know, he is.

IDC: Colonel Peltzer, I would like to request that this Agent be asked to come over independently of any telephone call so that we can determine this very matter.

IO: All right. When we finish with this witness, why I will see if I can arrange for his attendance here. Do you want him today? Do you want to have a recess now so that I can see if it can be done?

IDC: Well, I think that probably would be advisable.

IO: Do you want to proceed further with this witness?

IDC: I don't believe so.

IO: Are you finished with this witness?

IDC: Well, I think depending on what we determine from this other agent. I don't know whether I'm in a position to say for sure or not.

IO: Well, in other words, what you want to do is adjourn until—or recess in order that we can find out whether he can attend and we can possibly adjourn until he can attend and then reconvene with Mr. Mendelson and Mr. James in attendance.

IDC: Yes, sir.

* * * *

[57] IO: The hearing will come to order. Persons present: Commander Augenblick, Commander Windus, the appointed defense counsel, Mr. John A. Kendrick, individual civilian counsel, Lieutenant Gregory, assistant defense counsel, the reporter, Ketterer and the Investigating Of-

ficer and the witness who was previously on the stand, Mr. Mendelson. For the purpose of the record I'd like to say that my efforts to obtain the presence of Mr. Louis James to testify this afternoon have been unsuccessful; I have been advised that he is not available to his office or his superiors; that he is on the road; that they should be able to make contact with him sometime this afternoon or this evening and can make him available tomorrow morning. This can be done if the defense so desires and will be done if defense so desires. Now, for the purpose of further proceedings, it seems to me we have these alternatives: we can adjourn and come back tomorrow morning assuming that this is convenient also for Mr. Mendelson, who I understand is here from Norfolk. He has recently been transferred from this office and has appeared here from Norfolk under the understanding that he would be finished today and he would return. Perhaps he can stay over until tomorrow if you desire. This we can inquire of him. First, if you desire that he stay over or alternatively perhaps you want to recess and allow him to go over to see if there is a recording at the office and come back and complete the testimony and release him and decide then whether or not you desire Mr. James or Mr. Mendelson any further, or both of them further. I must, of course, inform Mr. James' superiors to notify him to have him available. Whatever you decide. I have no further suggestions. I'll allow counsel to proceed.

IDC: May it please the Investigating Officer. I think under the circumstances, in the light of the fact that Mr. Mendelson is here from out of the city and undoubtedly has duties to perform back in Norfolk which are essential [58] to the naval establishment, the fact that Mr. James is away, and will not be available until tomorrow and in the light of the suggestion that I understand was made during the luncheon recess by Mr. Mendelson—that perhaps we should solve the matter by taking a short recess and permitting Mr. Mendelson to call his office to determine whether there is, in fact, such a recording and I think probably that may very well satisfy the defense as to the problem.

IO: Do you have any objection to undertaking this Mr. Mendelson?

WIT: No, sir. I would be very happy to accommodate you if I can.

IO: Very well, if there is nothing further, we will recess for ten minutes to allow Mr. Mendelson to accomplish this and then we'll reconvene.

The hearing recessed at 1407, 13 July 1961.

The hearing opened at 1515, 13 July 1961.

IO: The proceedings are reconvened. The persons present are Commander Augenblick, Commander Windus, Mr. Kendrick, Mr. Gregory, Mr. Mendelson, the witness, and the reporter who was previously present, and the Investigating Officer. I believe I'll allow the defense to take it from there.

IDC: Mr. Mendelson, as a result of what investigation you have been able to make, can you state at this time whether or not there was a record made of the interrogation of Airman Hodges?

A. No, I cannot stated whether or not there was a record made of the interview with Airman Hodges.

Q. Who in the Office of Naval Intelligence or the Investigative Services of the United States Navy would know for certain ?

A. I don't know who would know for certain. I only can offer Special Agent Lou James' name as a person who either might recall or who may have made a record of such a recording. In other words, he may have made some notation. He's the only one that I know of that would be able to testify as to whether in his—to his recollection there was a recording of Airman Hodges' testimony made at that time.

Q. And so far as you know, there would be no one else in the Naval Establishment who could tell us that information?

[59] A. There is no one else as far as I know, no, sir.

* * * *

Q. Mr. Mendelson, in the building in which the second floor area is contained, at the time of the interrogation of Hodges followed by that of Commander Augenblick, to your knowledge, who were the sum personnel present?

A. At the time of the interview with Hodges, myself, Mr. Connor and Hodges were present in the room and Spe-

cial Agent James was possibly present in the—if you want to call it the recording room, or whatever you would like to term it.

Q. What would you term it?

A. I'd say the recording room. I think that's a good term. At the time of the interview with Commander Augenblick, just myself and Commander Augenblick and [60] Special Agent James were in that building as far as I know.

Q. Would you be able to say that there were no other Intelligence Officers or Agents present in—say on the second floor or in the ONI spaces?

A. No, I don't think there were, because I believe that they would have made themselves known to me if there had been any other Intelligence Agents or officers there. I don't even recall as there was a Duty Officer there at the time. There may have been, but I don't recall.

Q. By Duty Officer you mean . . . .

A. ONI Duty Officer. An Officer attached to the Naval Intelligence Unit there.

Q. But I mean a uniformed officer rather than a . . . .

A. A civilian type?

Q. A civilian agent.

A. Right. Let me clarify that. I don't recall actually seeing anybody but Special Agent James from the Naval Intelligence Section there. I don't recall seeing any uniformed officer or any Special Agent attached to that unit.

Q. Now, a moment ago you referred to a recording room. By a recording room do you mean a room where the controls are actually operated by which recordings are made?

A. Yes, I mean a room where the recordings would be located—and controls.

Q. Were there any enlisted personnel present to your knowledge?

A. To my knowledge I don't recall seeing any. If there was—no, I don't believe there were any enlisted personnel present, except—I make one exception. There may have been an Air Force or an Armed Forces Policeman way in the front part of the office, not any where near the Interview Room, when Commander Augenblick was in that

area before I got to talk to Commander Augenblick. There may have been an Armed Forces Policeman, I'm not sure of that.

[61] Q. . . .

A. But in the immediate area of which you speak, there was only myself, Connor, Hodges, Augenblick and James.

IDC: No further questions.

CROSS-EXAMINATION

Questions by the IO:

Q. If a tape were made by Mr. James, would this be retained by Mr. James in his custody or would it be turned into someone else?

A. No, sir. If a tape had been made, it should have been sent over to my office, which is in another building—incidentally, in Arlington, Virginia, with the Augenblick tape.

Q. Do you recall ever receiving such a tape?

A. No, I don't recall receiving a tape with Hodges' recording on it.

Q. Would it be possible that Mr. James would furnish a tape to the Air Force in view of the fact that Hodges, as I understand it, was an Air Force person?

A. I think he would have furnished it to us to furnish to the Air Force. As far as I know, the Air Force never requested any tape.

Q. Based on your experience, you'd furnish the transcript of the tape rather than the tape, or would you furnish the tape?

A. Based on my experience, we would furnish the tape to another office rather than a transcript of the tape.

Q. Now, would you have made a record if you would have received a tape on Hodges?

A. No, sir. I made no record of the tapes I received on Commander Augenblick either. It is merely a matter of receiving these tapes in a box with Commander Augenblick's name on it and these are retained for the purposes of—whatever purpose they might be needed for. Now, if I had gotten Hodges'—if there was a tape made by James

and it was sent over there, I would have received it, I'm sure, and the only alternative explanation I can have is that when the statement from Hodges came in, the tape was reused for another investigation.

Q. These are tapes that can be erased and reused?

[62] A. They are erased and reused all the time.

Q. Who makes the determination of whether they should be erased—whether a particular tape should be erased and reused? Is it the person who has custody of the tape?

A. Well, I would probably talk it over with the supervisor and say, "What about it. This man has given us a written statement. Now, we can use this on another case." And I don't recall doing that.

Q. Now, in your earlier testimony when Mr. Kendrick first started asking you questions, you referred to the White House, which I'm sure all of us understand here and reference to the Metropolitan Police. For the purposes of the record, this is the White House—the residence of the President of the United States in Washington, D. C. and the Metropolitan Police you are referring to are the members of the Police Department?

A. That was Patrolman Round—was that the gentleman? Patrolman Round was the man I think Mr. Kendrick had reference to.

Q. And who was the Pickeral who you refer to?

A. Patrolman Pickeral was an officer also, also a Police Officer attached to the same Precinct from whom I took a sworn statement.

Q. Is he a member of the Metropolitan Police Department of the District of Columbia?

A. He is, but I never have seen him since the time that I took the statement from him.

IO: I have no further questions. Do you gentlemen have any further questions?

IDC: NO, sir.

IO: Do you desire this witness to reappear tomorrow at 9 o'clock or . . . .

IDC: In view of the statement he's made here this afternoon, I don't believe we do.

IO: Your testimony as far as the tape in connection with Hodges is concerned is that you never received one [63] and you don't know if one was made, is that correct?

A. I wish you would turn it around a little bit. I don't know if one was made, or I don't have no recollection that one was made. However, if it was made, it apparently —and was delivered to me—it apparently is no longer a tape of Hodges' testimony. As I say, once the statement was received and the investigation was completed, it was apparently—if I had ever received it—it has been used by some other investigation.

Q. You have no present recollection of ever receiving it?

A. No, I do not.

IO: Does your comment still stand, Mr. Kendrick, that you don't desire this witness?

IDC: Correct.

IO: Well, is there any further proceedings you'd like to have now?

IO: Mr. Mendelson, you're instructed not to discuss your testimony as distinguished from the case with anyone, and if anyone does discuss your particular testimony here, he should notify the counsel, Commander Windus or Mr. Kendrick . . . .

WIT: I will do that.

IO: Do you have any questions about the distinction I am making about discussing the case?

WIT: No, sir, you have made it very plain. I cannot discuss my testimony but I can discuss . . . .

IO: All of your testimony is going to be reduced to a verbatim transcript and will be furnished in the form of a report to everyone who has immediate interest in the matter.

WIT: May I ask Mr. Kendrick a question. Inasmuch as I'm now in the Norfolk Area, if there are any other future proceedings in this, do you think that I will be called again as a witness by yourself?

IDC: I doubt it.

WIT: Needless to say, I will be very happy to come up again.

* * * *

[65] DIRECT EXAMINATION

Questions by the IO:

Q. You are Louis R. James, Special Agent of the Office of Naval Intelligence, Navy Department, assigned to duty with some command in Washington, D. C.?

[66] A. That's correct. The Intelligence Office.

Q. Would you state your duty station?

A. I am a Special Agent with the Intelligence Office, Potomac River Naval Command, U. S. Naval Weapons Plant, Washington, D. C.

IO: Your witness.

Questions by the IDC:

Q. Mr. James, we are inquiring regarding an incident which took place in the early part of this year in which you had some connection. First of all, would you tell me, Mr. James, by whom were you notified to appear here this morning?

A. I was officially notified by Captain Humphreys.

Q. And that was a person to person—by telephone, anyway?

A. Yes.

Q. And what were you told, was the purpose of your appearance?

A. Just that I was to appear in reference to this inquiry or court-martial. I understood a court-martial concerning Commander Augenblick in the case I had been associated with in the past.

Q. Now, have you since been informed of generally the purpose—have you had occasion to refresh your recollection at all with regard to your participation?

A. I did this morning. I was out of the office yesterday. I was notified when I came into the office—that was yesterday afternoon—that when I came into the office this morning I should stand by, that I might have to possibly have to testify, and so this morning, for a period of about 15 minutes or so I tried to check over my notes in the case file—refresh my memory.

Q. Did you discuss the case with anyone?

A. I did not.

Q. Did you . . .

A. Not to any degree other than look at the file, try to refresh my memory.

[67] Q. Now, let me see if I understand you. You did not do—to any degree—do I gather that you did discuss it with someone?

A. Only my—just a word or two with my supervisor, an assistant supervising agent. At the time I was coming over, he said I should be over here this morning. I told him I had received a call from Captain Humphreys. He said that I had best look over the file to refresh my memory. I said, yes, sir. And he secured the file for me from our files and I reviewed it briefly. I didn't discuss it in detail with him.

Q. Did you discuss it with anyone else either today or yesterday other than Captain Humphreys and your immediate supervisor?

A. No.

Q. Now, what does this file comprise that you refreshed your recollection by?

A. Just the investigating file in our office in the Intelligence Office, PRNC, which would be basically the same as the ONI file. I cannot vouch that the file would exist in Headquarters; I would not have seen it.

Q. Now, do you, as a result of this refreshing of your recollection, recall your connection with the case?

A. I do. In general, yes.

Q. Well, will you tell us when the matter first came to your attention, what your status was and what you did as a result of it?

A. Well, let's see. As I recall, the incident occurred on 12 January of this year. At the time I was on duty—and I mean by that—this was after working hours, we have agents assigned to duty around the clock on call after the office closes at night. I was on call that particular night, which would have been the night of the 11th and the morning of the 12th.

Q. By call you mean actually physically there or on call?

A. I'm at home available by telephone.

Q. Right.

A. I received a call from our Duty Officer who us [68] usually a chief or one of the enlisted people—in some cases, an officer is the Duty Watch Officer. I received a call and was informed to come to the office. On these investigating matters they don't usually outline what is involved; they're just there to summon us to the office. They may have a set of facts or instructions for us..

Q. Who was the person who notified you in this instance?

A. The Watch Officer that night was an enlisted person by the name of Cartin. He was a photographer but he is no longer assigned to that office; he was just an intermediary in receiving calls. He had no official capacity whatsoever.

Q. All right. He notified you at you home. He called approximately what time?

A. Let's see. It must have been around 1 o'clock—1—1:30, and then I came into the office.

Q. Let me interrupt you a minute, Mr. James. What we're inquiring into here—I'm sure you understand—your language indicates that you're testifying to a general policy rather than what was done this particular time. In other words, you said, then I would come into the office—I want to know what your best recollection is as to . . . .

A. Well, no, I'm stating what actually happened—general policy being involved—and what actually takes place in this instance.

Q. Pursuant to this call, what did you do?

A. I went to the office; I arrived—oh, perhaps 1, 1:30—I had a note, but I must have left it over in the office. Let's see if I have it—but I don't think that reflected the actual time I reported. But, after I was there a short time—I was the first to arrive.

Q. So that when you arrived, it was just you and an enlisted man that was there?

A. That's right. And I received the information—basically that an officer assigned to OPNAV, I think that had been established, at the Armed Forces Police Office or was in their custody as a result of an arrest. The Armed Forces Police Office was right next door, actually within

[69] the same building as our office—in another wing, and I was told that on Agent from ONI Headquarters—which would be ONI Headquarters at the Service Center over in Arlington—was coming down to our office and work with me on this case, or was coming down in reference to the investigation of the case, and this happened to be, and was, Special Agent Mendelson—William G. Mendelson. He is not attached to our office, but is attached to ONI Headquarters at the Service Center. He's the Headquarters Agent, if you want to term it that, and he arrived. . . .

Q. You did nothing between your arrival and his?

A. No, sir. I did nothing. And he arrived subsequently—I would say within the next half hour. . . .

Q. Let me interrupt you a second further, Mr. James. The Office to which you reported when you came in, is that on the first floor or the second floor or the third floor or what?

A. Our Office is in Building 166 on the second floor—second deck actually.

Q. And that's the office to which you reported when you came in?

A. To my office, the Intelligence Office, PRNC—IO PRNC it is designated.

Q. Then when Mr. Mendelson arrived, what occurred?

A. We had determined at that time that the officer in question under arrest, Commander Augenblick, was in custody of the Armed Forces Police next door and was physically at their office along with the other individual involved in this case—an Airman, Hodges, I believe, by name—Airman Hodges.

Q. All right.

A. We went into our office for just a very short time—Mr. Mendelson said that his office at that time, meaning ONI Headquarters, would assume jurisdiction, if that is the correct word to use, of this particular case, and we went then directly over to the Armed Forces Police Office to the basement where they were holding in custody the two in-
[70] dividuals I have spoken of. There we met and this information that I had ahead of time—I understood there was also an Air Force—an OSI Investigator—had been notified concerning the incident and he was there in the

interest of the Air Force inasmuch as an Air Force enlisted man had been involved and he was there when Mr. Mendelson and myself arrived in the office—in the basement of the Armed Forces Police. It was just a few minutes—a matter of turning, officially turning over both the Airman and Commander Augenblick to our custody—turning over from the custody of the Armed Forces Police to our custody—a matter of signing papers. I did not participate in the signing of those papers. It was necessary for Mr. Mendelson to sign and probably the officer of the Air Force.

Q. And then what occurred?

A. We returned to our office, which is a matter of going out of the building into the other wing and up to the second floor. Now, as I recall—on my card as I refreshed my memory this morning—this was approximately in the vicinity of 3 o'clock. I guess you would say pretty much an hour had—or a little more—had transpired since I had arrived in my office and me and Mr. Mendelson going over and returning to our office with the Airman and Commander Augenblick. So, five of us returned to our office at approximately 3 o'clock?

Q. Then what occurred?

A. At that point, as I refresh my memory now, at that point Mr. Mendelson, Special Agent Mendelson and the Air Force Investigator—I didn't note his name, but I've had no contacts with him since then—this was my first meeting with him—talked, interrogated, interviewed—whichever term you wish to use—interrogation is probably the most apt term—the enlisted Air Force man, Hodges, for a brief period of time. I was not present; this was done strictly by Mr.—or Special Agent Mendelson and the Air Force Investigator.

Q. You say you were not present?

A. I was not present during the interview.

[71] Q. Where were you?

A. I, at the time, was operating the tapes which we record for interrogation.

Q. During the interrogation of Hodges?

A. During the interrogation I was not present in the room—in the interrogating room during that time. It was handled strictly by Mr. Mendelson and inasmuch as

having three people in an interrogation, it serves no purpose. The Air Force man had to be there, of course, inasmuch as an Air Force enlisted man was involved, and Mr. Mendelson was there in reference to the Navy's aspects of the investigation. I was. . . .

Q. It was also necessary for you to go through the physical operation of these controls?

A. And arranging the room—seeing that everything was properly taken care of.

Q. Now, did you stand by the recording device throughout this interview?

A. To the best of my knowledge, I did, yes, sir.

Q. Are you able at the time that you are operating the device, able to also listen to the interrogation through a monitoring device or anything of that sort, or is it just a matter of your operating the controls?

A. No, I am able to listen.

Q. And did you listen, do you recall?

A. As I recall, I listened. It's the usual case that I do—not listen in detail as I would had I been present in the interrogation or as I do when I am interrogating.

Q. Assume before the interrogation commenced, Mr. Mendelson having taken jurisdiction by virtue of being from ONI Headquarters itself, did he give you instructions to make this recording or was this on your own or how did that come about?

A. This is pretty much normal procedure. I won't say that he didn't say not to record it, but at the same time, if he had not said anything I would have—it's usual routine.

[72] Q. All right, sir. About how long did that take, do you recall?

A. I think I can pin that down fairly well. It was brief—fairly brief. I'd say about 20 minutes to a half hour.

Q. And then what occurred, if you recall?

A. Well, following the interrogation of Hodges, the Air Force man, he was returned—he was, of course, at that time, officially in the custody of the OSI Investigator, and there was no reason for us to have him present any longer. He left in the custody of the Air Force Investigator; they

departed from our office—the two of them—approximately, I'd say a half hour after the interrogation began. As my notes indicate that I took this morning, I believe this is approximately 3:30 or quarter to four in the morning when this part of the investigation had been completed. He left in the custody of the Air Force Investigator to return, to the best of my knowledge, to his office—to the OSI Office—at Andrews or Bolling for further disposition of the Air Force man.

Q. Now, did you remain there after that—after he had left?

A. Did I remain in the office—I did, yes, sir.

Q. And were you also present when the Commander was interrogated?

A. Not present during the interrogation.

Q. You were performing the same function which you did before?

A. Performing the same function.

Q. In other words, you were standing by the controls?

A. Standing by the controls.

Q. Of this recording device?

A. But not sitting in on the interrogation—being present at it.

Q. Do I gather from what you say that the controls of this device are at some other area in the room or maybe in another room?

A. Adjacent to . . . .

Q. And the interrogation itself takes place in a smaller room or something of that sort?

[73] A. Yes, basically—in a small interrogation room. It is not a large room; it's a fairly small room.

Q. Now, were you also present at still a later interview of the Commander—or not present, but physically there while such an interview took place?

A. Now, later interview. Could you put that . . . .

Q. Were you present at a time in which Commander Augenblick and a young naval Lieutenant, who was acting as his counsel, were interrogated?

A. No, I was not.

Q. Now, upon the completion of the interview of Commander Augenblick, what occurred?

A. This was an approximate time sequence—I'd say in the vicinity of 6 or 6:30 in the morning of the 12th. The interrogation had been completed; Commander Augenblick, I believe, was asked to remain at the—or in the forward part of our office until we decided what next step was to be taken at the completion of the interrogation. The primary problem for the Agent—for the investigator is to determine what to do with the person involved as far as custody—he's still in our custody and we have to determine what to do and also to notify the proper authorities basically of what took place. This proper authority being the officer's Commanding Officer or his superior officer, the office to which he might be assigned. This would vary with the person involved. At this time Mr. Mendelson and I, of course, would be working together—not in commander Augenblick's presence; we determined then that he was not to be returned officially to the custody of the Armed Forces Police; there was no reason to return him to their custody or to directly return him to his office, which we established was the Pentagon—OPNAV Office; we were instructed—Mr. Mendelson was instructed, of course he would have handled all of this himself being in charge of the investigation, to return Commander Augenblick to his home—there to await any further orders from his superior officer, who we were going to contact.

Q. Now, did you accompany the Commander or Men-
[74] delson to Commander Augenblick's home?

A. I did not accompany them, but I followed them in another car. They left at a period 20 minutes prior to my leaving the office and my instructions were to meet them at his—at Commander Augenblick's home.

Q. Did you do anything with regard to the case in that 20 minutes interval before you left?

A. No. I had nothing to do. I was just preparing to leave—secure. As I recall, I had left the Weapons Plant —I was driving on "M" Street just three or four minutes from the office when I actually ran out of gas. I picked up one of the office cars and I had to have the car pushed into the Gun Factory—it wasn't too far away. I went back for another car. So I was delayed. My arrival at Commander Augenblick's home in Arlington was a half hour later than it should have been.

Q. The ONI's first echelon broke down.

A. Broke down in this particular case.

Q. And then you went on to the Commander's home?

A. I did.

Q. And there I believe you participated in a search of his effects?

A. With him.

Q. And upon completion of that search, what did you do? Return to ONI or . . . .

A. I think I briefly returned to my home, which is in the area, for breakfast. I was at home probably a half hour.

Q. Now, so far as you are personally concerned, what did you do thereafter on the case, either with Mr. Mendelson or on your own or with another Agent?

A. All right. Following that, my only responsibility in the case, and only work that I did in connection with the case was writing an official office memo—it's not an investigative report as such, but an office memo as to what had transpired from the time that I had arrived at the office until after the search of Commander Augenblick's home, [75] which was the termination of my part—that was for our office—that was for our office memo and it was also for the ONI Headquarters of the Intelligence Office's part, functioning, in this particular investigation.

Q. And do you recall, or did you refresh your recollection any in preparing this memorandum, by listening to either of these two recordings which had been taken that morning?

A. No, I did not. No, my memorandum did not require that I put anything as to the interrogation inasmuch as this was still a function of the ONI Headquarters—Agent Mendelson.

Q. Did you either that day or at any subsequent time, have occasion to listen to either of those recordings again?

A. No. I did not—not subsequent.

Q. How are they taken? On a tape or cylinder or what is the . . . .

A. A tape.

Q. What did you do with the tape or tapes, whichever was required to take this testimony?

A. I delivered them—hand-carried them to ONI Headquarters at the Service Center.

Q. And do you recall when that was?

A. It would have been within a day of the 12th. On the day of the 12th I would have returned to my office that morning and returned the tapes that very morning.

Q. Returned them or taken them?

A. I would have taken them from my office to—the tape physically belonged to our office, material wise. I took them to ONI Headquarters that very morning.

Q. Do you recall to whom there you delivered them?

A. Yes. I delivered them to the Supervising Agent, ONI Headquarters.

Q. And his name?

A. Mr. Ted Fason.

[76] Q. Is that F-A-S-O-N?

A. F-A-S-O-N.

Q. Do you get any sort of receipt or anything for that, those being your own tapes?

A. No. It's not necessary since it's all within ONI functions.

Q. And do you know whether they've ever been returned?

A. To my knowledge they have not been returned. It's very possible that they would have been returned without my knowing it since they have to come back into what we call—the technical personnel would handle them. They might be delivered directly to him for further use—I mean to be reused again. They're usable tapes, but to the best of my knowledge, no.

Q. What do you use, Webcor or . . .

A. No. I can't think of it. I'm not actually one of the technical people in the office.

Q. And, now when you said you delivered them to Mr. Fason at ONI Headquarters, is that over at the Service Center, Arlington?

A. Arlington.

IO: May I relieve the reporters. Is this convenient.

IDC: You want to change. Yes I'm sorry.

IO: Mr. Arena, will you raise your hand.

James J. Ketterer, PN1, U. S. Navy, the previous reporter, withdraw from the courtroom.

[77] Mr. Vincent Arena was sworn as reporter.

Q. Do you know as a matter of practice, Mr. James, whether, when recordings are made of this sort, there is usually a stenographic transcript made of them?

A. I can speak only for our particular office. To my knowledge, no.

Q. In other words, when whomever is charged with reviewing them wants, he can listen to them, but it is not customary to stenographically transcribe them?

A. No, not in my office.

Q. Have you ever worked in ONI Headquarters?

A. No. I have always been attached to PRNC.

Q. Do you know from what you have heard from other agents, or people who are familiar with the process, whether or not it is customary to reduce them to stenographic notes?

A. I have never heard of it mentioned. No, I have not. I couldn't really actually say what the practice is of the individual agent.

Q. Where in the chain of hierarchy does Mr. Fason stand?

A. His official title would be Supervising Agent.

Q. Of what?

A. I'm not too certain of this—he is the Supervising Agent of ONI Headquarters Activity agents. Actually OP 921(D) would be his official title. OP 921(D) Supervising Agent of ONI Headquarters Activity—Supervisor of the agents attached to that particular office. In our office we have a Supervising Agent. As in every district office, there is a Supervising Agent.

Q. Do you know is there any particular procedure, so far as you are aware, in the Headquarters as to how long recordings are retained there or what their practice is about returning them to the individual district office?

A. I know of nothing concerning any set down procedure. I can only comment on our own office.

[78] Q. Would you?

A. I couldn't—well, as far as tapes are concerned, they are usually maintained throughout their usefulness, if you could put it that way.

Q. In other words, until a case is fully washed out?

A. Yes, until a case is fully washed out and completed, you see no longer use for the tapes, which would be primarily to the discretion of the individual agent handling the case.

IDC: I believe that's all, Mr. James. Thank you.

* * * *

[79] Questions by IO:

Q. You are Theodore Fason, Supervising Agent of the ONI?

A. Yes, sir.

IO: You are being called as a witness by the defense. Your witness.

Questions by IDC:

Q. Mr. Fason, as Supervising Agent of the ONI, does that place you in a supervisory capacity of all agents of the Office of Naval Intelligence of the local area, the physical confines?

A. Confines, yes.

Q. Mr. Fason, we are inquiring about a course of events incident to the preferring of charges against Commander Richard Augenblick. Are you familiar with the case as such?

A. I'm vaguely familiar with the case, yes, sir.

Q. You know that such a case exists?

A. I know that such a case exists, yes.

Q. Now, can you recall for us any connection that you may have had with the case particularly in the beginning which would have been on or about 12 January 1961?

A. I was made cognizant of the fact that an incident had happened, and that Commander Augenblick allegedly had been arrested, and from there on I had no further contact or, I should say, knowledge of the case. The actions of the case were initiated—I mean started and that's —I had no direct knowledge or no direct contact with Commander Augenblick or in pursuit of the case.

Q. Was it you who assigned a Mr. Mendelson to the case?

A. Yes, sir.

Q. And was it you who received the initial call that day from the Armed Services Police to the effect that a Commander had been apprehended?

[80] A. I'm vague in my recollection as to if I had received the call direct or if the call came to through the Potomac River Naval Command. I don't know if—I'm inclined to think that the call came to me indirectly from the Armed Forces Police.

Q. And pursuant to that, you assigned Mr. Mendelson?

A. Pursuant to that, I assigned Mr. Mendelson to determine the facts.

Q. And did you receive any report verbally or otherwise on that same day from Mr. Mendelson?

A. That morning I received a report verbally from Mr. Mendelson that the Commander had been talked to and that the Airman involved had also been talked to by the Air Force authorities.

Q. Did you receive any other report verbal or otherwise on that same day regarding the case?

A. To my knowledge I did not receive any physical report. I received, as I said, the verbal report to the effect that a statement—I'm thinking—that a statement had been taken from Commander Augenblick, that the other individual, the Airman, had given a statement, and that this had all transpired at PRNC; and it was my understanding that here had been recordings made. I don't know whose recording or whose statements.

Q. Now, was that information conveyed to you by Mr. Mendelson or whom?

A. No, that information was conveyed to me by—briefly, Mr. Mendelson mentioned it. But Mr. James—Louis James I think is his first name—Special Agent, PRNC, advised me that recordings had been made. He didn't identify as to whom or what recordings and that statement had been obtained from—I think the name is Connor of the Air Force.

Q. Did he advise you in person or by telephone or how?

[81] A. He advised me in person. He came to the office the morning hours of that day—I don't remember the exact date, but early morning hours of that day.

Q. That would be the 12th as far as you can recall?

A. I recall it as that date, yes.

Q. And did he deliver any recordings to you?

A. He did not deliver to me personally. He had in his possession unidentified recordings.

Q. By unidentified, by you or by what?

A. Unidentified by me. I had no direct knowledge of their content or when they were taken or from whom.

Q. You say he had them in his possession? What did he do with them, if you know?

A. He had in his possession—I might clarify that—he had in his possession—all that I saw was a box which normally contains a recording tape. I didn't actually see the tapes. I did not actually see or listen or hear the recordings. I saw a box.

Q. And do you know what he did with it?

A. This is a presumption. I presume he turned it over to Mr. Scinta.

Q. And who is he, sir?

A. He is the Special Agent in ONI responsible for particular type investigations.

Q. Mr. Fason, I wonder if you would think back again for a moment, are you certain that they were not delivered to you or it was not delivered to you?

A. I feel it was brought into my presence. I know that, but having no control over the activities of that particular agent, the administrative control of the case, I did not accept the tapes. I had no purpose, no reason to accept them and physically retain them in my possession. And I feel sure that I informed or advised the agent to go, [82] either to take them with Mr. Mendelson or through Mr. Mendelson, to give them to, for custody, Mr. Scinta for retention.

Q. I don't mean to seem contentious, but if we had sworn testimony to the effect that delivery was made to you, would that refresh your recollection at all?

A. Well, I don't say that it will refresh my recollection. To the best of my recollection—we are getting now—we are playing with—I know the tapes were delivered. I know they came up there, but I know I never actually accepted the tapes. Knowing what they were or what they were supposed to be, I never accepted them. I merely advised the agent to take them on down to Mr. Scinta. He is the retainer of the tapes.

Q. He is a subordinate of yours?

A. No, he is not a subordinate of mine. He is a section head, and he has administrative control over particular type cases. Now, I say the agent, the individual could give sworn testimony to the effect that he had turned them over to me. Technically, he is correct when he comes in my presence and says "here, I have them." I tell him to go down below and turn them over to the controlling authority in the matter.

Q. Now, well, let me see if I understand one thing here. I believe you said you were the Supervising Agent of all the agents in ONI?

A. Right.

Q. And Mr. Scinta is an agent?

A. Mr. Scinta is an agent who is in charge of a section. I'm in charge of the Operations Section, physically responsible, or actually responsible for the operations of the Office of Naval Intelligence agentwise. There are other agents of the ONI, I have no authority, jurisdiction, or control over them, in other sections which is out of Operations.

[83] Q. So to the best of your recollection these tapes or this box of tapes was delivered to Mr. Scinta?

A. To the best of my recollection.

Q. At the time that Mr. James came into the office that morning, was he accompaned by Mr. Mendelson or by himself?

A. I don't remember now. To the best of my recollection, I think that James came in alone. The first time I saw him he was alone. Now, I don't know how he came into the office or who accompanied him. As I said before, he was in my presence. I recollect that he was alone at the time?

Q. Now, do you know of your own knowledge what disposition was made of those tapes afterwards?

A. I do not.

Q. I believe this matter was discussed with you at some length yesterday on the telephone with Mr. Mendelson, this same agent that we have just mentioned. Tell us, Mr. Fason, what is the customary procedure for handling items of this nature?

A. The customary procedure for handling items of that nature is the controlling section will retain as evidence or under the same conditions as evidence any tapes or anything else pertinent to—any physical evidence pertinent to an investigation.

Q. Now, when you say will retain them, you didn't set any limit on it?

A. To my knowledge, there is no established time for retention, particularly in the development of evidence which does not have to be returned.

Q. Would it be safe to say that it would customarily be retained until the matter was completed so far as the Navy was concerned?

A. I would say that it would be customary to retain it until the matter which was at issue was settled.

[84] Q. Do you know whether or not it has been retained?

A. I have no knowledge of it. Actually, I have no knowledge of the existence of any particular or specific tape.

Q. Well, this box of tapes that you did see, do you know what disposition has been made of it?

A. I presume that it is still retained.

Q. And so that we can pin it down, could you tell us by whom under established procedure in the Office of Naval Intelligence it would be retained?

A. I can't go beyond the fact saying that it would go to the section head, Mr. Scinta for retention. Now, I don't know the procedure there—I mean from his point, his method of retention.

Q. I suppose you are familiar with the physical setup of his section, are you not?

A. Yes, sir, I am.

Q. Does he have there cabinets or files or whatever in which physical evidence is customarily stowed?

A. He has in his office—this is an estimation—I would say in excess of fifty file cabinets, lockers, storage spaces, that can be utilized for that purpose.

Q. Do you know of your own knowledge whether there are other sections or areas or persons responsible for the storage of physical evidence?

A. To my knowledge, yes, there is a section that is responsible for the storage of physical evidence what is termed Support Section D-4, and they have facilities for storage of classified material, evidence, whatnot.

[85] Q. May I ask this sir: Do you know as far as procedure is concerned if Mr. Scinta is initially given the custody of articles, is there any gradation or classification or whatever that would cause him in the course of events to turn certain items over to this other section, or does he, once having assumed custody, retain them?

A. Well, I can't answer that question, sir, because I don't know the breakdown or the chain so far as retention of material that he gets. I don't know where he stows it. I don't know the procedure that he uses. I don't know if it goes over to another section to be stored in a specific specified place.

Q. Well, so far as you are concerned, when you instructed this agent James to deliver it to Mr. Scinta, was that instruction given by virtue of your knowledge of the fact that this is the type of thing that Scinta and not D-4 handles?

A. This is the type of thing so far as the actual handling, the administrative control of the case, that Scinta handles. Scinta is under D-4. He is in that section.

Q. In other words, the overall division under which Scinta is a branch?

A. Let's call D-4 a section. Scinta is a unit.

Q. Well, now would there be items which might be tendered to you which by virtue of policy, directives, or other instructions which you have, would cause you to say this should go to D-4 rather than to Scinta.

A. Items of evidentiary value would be retained by D-4 so far as I'm concerned in D-3. They would retain the evidence. If it's a particular type case, the administrative control of that case comes under Mr. Scinta; on this particular instance, it would come under other special agents in different type cases. D-4 is the support section, and they I'm positive, have the overall custody or responsibility for the maintenance of all evidence no matter which section it might come from. Do I make myself clear?

[86] Q. No.
A. I don't.
Q. No, I lost you back there.
IO: Could I ask a question here?
IDC: Go right ahead.

Questions by IO:

Q. Would you consider D-4 a staff function and Mr. Scinta is actually an administrative or operation function that maintains physical custody of these things under a policy, directive, or specific instruction, of D-4?

A. Maybe I can explain the organizational setup this way: OP-921(D) is a part of a Security Branch 921. It is broken down into branches or branch. (D) Branch is broken down into sections which is further broken down into units. Within my particular section, I'm OP-921 (D-3), which is the Operations Section. OP-921(D-4) is the Support Section. In Support, I mean they furnish the equipment. They furnish the technical guidance necessary for the operation of any equipment that we might need. They furnish the facilities for stowing or for maintenance, custody and control over any evidence or any materials that might come in being retained by the Director of Naval Intelligence for us. It so happens in this instance that Mr. Scinta is a unit under the overall supervision of a section—I mean, he is a unit of that section D-4, but D-4 is the Support Section. I think that's the way it is on the chart on the OPNAV breakdown—Support, which is maintenance, custody, obtain equipment, and so forth.

Q. But anything that came into anyone of the sections of D-4 which called for stowage would ultimately get to Scinta as a repository thereof?

[87] A. No, sir, opposite. Anything that came in for stowage or for use would get to D-4 as a repository as a section that's set up. Scinta is below D-4.

Q. I understand that.

A. For a unit—for a particular type investigation, any information that comes in, or any evidence that's been obtained in connection with this particular type investigation that Mr. Scinta as a unit head is responsible for administrative control, gets to D-4 through Mr. Scinta.

Questions by DC:

Q. D-4 is a repository for evidence, is it not?

A. That's my term and that's my interpretation, yes.

Q. A piece of evidence would be sent to D-4 for retention, would it not, physical evidence?

A. Yes.

Q. It might or might not be physically retained in Mr. Scinta's unit as distinguished from say Units X and Y which are also part of D-4, is that correct? In other words, if a piece of evidence went to D-4 and it pertained to a particular type case, it would then be under the immediate control of Mr. Scinta's unit for custody and protection?

A. Yes.

Q. And if on the other hand it pertained to another type case, for instance, suppose Mr. Scinta handled all murder cases and this piece of evidence had to do with murder, it would then end up in Mr. Scinta's unit, is that correct?

A. The administrative control would end up in Mr. Scinta's unit. The physical control would be, I think, vested in D-4 to physically control the evidence.

[89] IO: He is trying to separate accounting for the item from all physical custody of the item in this particular case.

Questions by IO:

Q. As I understand, what you are saying is that, because of the type of case involved, Mr. Scinta would maintain the records and administration of it, but somebody else may actually have the key to the safe in which it is locked up and kept?

A. That's right.

Q. In other words, you are separating accountability or responsibility for the record keeping track of it from the physical custody of the item yourself? Would that be substantially correct?

A. Yes.

Q. I understand Mr. Scinta could tell you if it is in his records, if there is a record of this, where it is located, but

if his records did not show it, it still may or may not be present. Somebody else would have to account for that if they went and looked for it and it wasn't there?

A. —

Questions by IDC:

Q. Then, do I understand that Mr. Scinta being accountable for having logged evidence in whatever type records he keeps, would not necessarily then physically put that evidence in one of, say his fifty file cabinets? It might go down to another section, is that right?

A. Would you mind repeating that again.

Q. I'm perhaps being obtuse, but let me ask one question first. I assume that Mr. Scinta among other things has to do with the accountability for evidence in cases in which some type of sexual perversion is alleged, is that right?

[90] A. I would go along with your assumption on that to the point he is responsible for the administrative control. Again we get into that administrative control, and the actual operation is someone elses responsibility. And taking this a step farther, the actual retention or custody of any evidence would be passed on to the section head or the one responsible for the retention of evidence that is collected with any case.

Q. Now, is that section head who is responsible for the retention the same person in all types of cases?

A. Yes.

Q. And who is that person?

A. The head of D-4 is Mr. Lynch.

Q. Now, Mr. Lynch is responsible for the retention, is that correct?

A. To my knowledge, yes.

Q. But does he physically have retention?

A. I couldn't answer that. I don't know what you mean "physically."

Q. He has the responsibility for the retention as the section chief of D-4?

A. That's my presumption, yes.

Questions by IO;

Q. It is distinguished from personal. He doesn't personally keep everything in his personal possession?

A. I doubt that very much.

Questions by IDC:

Q. Mr. Fason, if we can sort of cut through the administrative setup here so as to simplify things, if you were sitting in the position that Colonel Peltzer occupies and you were trying to find out the quickest way—find out where these tapes were, whom would you go to?

[91] A. You say these tapes. What tapes do you have reference to?

Q. The tapes Mr. James brought in to you in your presence and took them elsewhere?

A. I think I would take the same means or measures that you have already taken to find the tapes, if they exist.

Q. Well, would you think the quickest way to get results would perhaps be to request the Director of Naval Intelligence?

A. No, sir. I think that would be rather—well, unnecessary—I mean to request the Director of Naval Intelligence.

Q. May I ask you this: Have you required or inquired of anyone other than myself or other than Mr. Mendelson?

A. Yes.

Q. I believe you know, sir, do you not, that Mr. Mendelson inquired of Mr. Lynch at least and of one other individual, I believe, although I'm not certain, in addition to yourself, and so far we are at an impasse?

A. Well, have you found any tapes or have you not found a specific tape?

Q. We haven't found anything.

IO: May I ask a question at this point.

IDC: Yes. Go right ahead.

Questions by IO:

Q. In the course of telephones by Mr. Mendelson yesterday, Mr. Fason, were you contacted on the telephone?

A. Yes. Mr. Mendelson called me.

Q. Do you know of your own knowledge whether a search was made so to speak?

A. Of my knowledge, I do not.

[92] Q. Do you know from hearsay or by talk around the office that any search was made to locate the tapes?

A. No. Frankly, I don't know even by hearsay, but when Mr. Mendelson called me, I referred him—suggested to him that he call Mr. Scinta.

Q. Mr. Scinta?

A. Yes. And I told Mr. Mendelson substantially the same thing that I have passed here.

Q. He should go to Mr. Scinta or Mr. Lynch?

A. To go to Mr. Scinta. And he has not contacted me since then, and I say I don't know by hearsay if a search was made or not because I haven't discussed it with anybody else until you called this morning.

Q. The situation has gotten into discussing certain tapes, and you have inferred as though there were some actual tapes. As far as you know, Mr. James came into your office with a box which purportedly contained tapes? You never did see anything, any tapes?

A. That's right. It was a box.

Q. And you directed him to take these to Mr. Scinta?

A. Yes.

Q. You don't really know if there ever was a tape or tapes?

A. That is correct. Of my knowledge, no.

Q. You wouldn't know if Mr. James had made a recording of more than one subject on a single tape? This could be done, could it not?

A. Yes. He could make—I don't know that he did in this instance—but he could make recordings of numerous subjects on one tape. The one tape is good for two hours.

Q. So physically when we talk about tape the singular or the tapes the plural, there couldn't physically be one tape with an interview of more than one person recorded on this tape, is that correct? Am I correct?

A. Yes, sir.

[93] Q. You didn't go with Mr. James down to turn anything else into Mr. Scinta, did you?

A. No, sir.

Q. Now, supposing a subject had made—I'm not asking you right now what happened in this case. I'm asking you for common customary practice which you would consider

acceptable investigative procedure. If recordings are made of interviews and subsequently the individuals execute written statements or sign a written statement, would it be customary to compare the tape and the statement, and if they are substantially the same, erase the tape and use it over again?

A. It would be customary not to compare the tape and the statement because the statement stands alone by itself. But if the tape, if at the moment there would be no purpose to stow it or to keep it, it would be reused, or at a future time when its utility purpose has been exhausted, it would be erased and reused again.

Q. Could an agent draw a tape out from Mr. Scinta or D-4, which he had turned in for temporary custody, determine that he thought it was no longer essential and erase this tape and use it for other purposes?

A. Well, an agent could. It is possible for an agent after he completes a case to determine within his own knowledge of the case that it is no longer necessary to retain any tapes in connection with it, and it would be not personally reused by him, but it would be put back in the system to be used again.

Q. Who determines the propriety of keeping the interview on the tape or reusing or erasing of the tape? Does the agent who has investigated the case do this? If it was one of your agents, would you?

A. He would discuss it with me. It would be his determination, let's say, or decision. He would state, "We don't [94] need this any more, you can erase it or you can destroy it." And in turn it would be up to me to make the decision or second determination if we need it in the future or not.

Q. Was any discussion ever held—Mr. Mendelson works for you, is that correct?

A. Yes.

Q. Did Mr. Mendelson ever discuss with you whether or not tapes, taped interviews in this case of any persons should be retained or erases or released for us?

A. To my knowledge any discussion that he had with me was concerned with retention of tapes in this case.

Q. What was the substance of this discussion?

A. I don't recollect. Well, the substance of the discussion was: We will retain these tapes because of their possible utilization, and I don't have any knowledge of ever discussing with him the desirability or feasibility of destroying any.

Q. Now, this incident occurred on the night of the 11th or 12th of January 1961, alleged incident between the Commander and the Airman. You said you had a verbal discussion with Mr. Mendelson. Assuming that was the day, that would be the 12th, you had a discussion with him, correct? He testified earlier that he gave you a verbal report of the alleged incident of generally what had happened?

A. I think the recollection was brought to my mind that was the 12th.

Q. Right, you would have talked to him on the 12th. The alleged incident happened either on the evening or early morning which would be the 11th?

A. It happened on the 11th or 12th.

[95] Q. Now, this initial discussion you had with Mr. Mendelson would be on the 12th that you talked about earlier when he gave you a brief rundown of what had transpired?

A. To the best of my recollection, yes.

Q. When would this discussion of tapes have taken place? Would it have taken place on the 12th or subsequent?

A. I can't recollect any discussion or destruction of any tapes. That's what you are asking me, is it not?

Q. The retention of tapes?

A. If we had a discussion of the tapes, to my knowledge that morning, I'm sure on the 12th, my discussion pertaining to the tapes was concerning retention, if you have any tapes or any statements or anything, retain them.

Q. Would it not be within your capability either possibly, or your authority—not your strict authority, because I understand you are D-3 and Mr. Lynch is your co-equal—not your strict authority—would you think it would be within your capability to have Mr. Lynch search his records, ask him to cooperate and search his records, his actual physical custody, and his retention place for

any tapes or records of tapes relating to this case which he may have?

A. Within my capability, I could inquire.

IO: It is entirely possible this has already been done, and Mr. Lynch would be able to tell you the result if this has been done. Now, the reason I mention this is if you want to call Mr. Lynch and ask him if this has been done and find out, I have no further questions at this time. Do you have any further questions, Mr. Kendrick?

Questions by IDC:

[96] Q. In this initial discussion that you had with Mr. Mendelson that morning or that day, you became aware at that time that recordings had been made of these interviews, is that correct?

A. No, sir, I won't say that I became aware at that time. I became aware of the fact that James came to my office with the box, and I did not break it down to identify that a recording had been made of any particular specified individual.

Q. Would you be willing to inquire of Mr. Lynch as asked by Colonel Peltzer?

A. I would.

IDC: Sir, I'd like to withdraw that request, and if it's agreeable with the Colonel, I think probably in lieu—I think we can excuse this witness at this time.

* * * *

[97] Questions by IO:

Q. You are the Mr. James who has previously been called as a witness and you were sworn in this proceeding and you were sworn as a witness. Do you recall that?

A. Yes, sir.

Q. You are reminded that the oath you previously took is still binding.

A. Yes, sir.

Q. Mr. James, do you have in your custody certain tapes which purport to relate to the incident which is the subject matter of this hearing, which is an incident which took place allegedly involving Commander Augenblick and Airman Hodges?

A. I do, sir.

Q. Have you made an inquiry to ascertain to the best of your own knowledge whether or not these are the only tapes or whether there are further tapes relating to any interviews of any witnesses in this particular case?

A. To the best of my knowledge, these are the only tapes at the present time concerning this particular investigation.

[98] Q. If I recall your previous testimony correctly, you said that you made a recording of an interview by Mr. Connor of Hodges, members of the Air Force, is that correct?

A. Yes, sir, I did.

Q. Do you know whether that interview is in these tapes?

A. To the best of my knowledge, it is not.

Q. Have you had a chance to play these tapes previously?

A. No, I have not. I have never played them.

Q. You made a tape or recorded the interview of Hodges with an Air Force agent by the name of Connor and also an interview of Agent Mendelson of the Navy and Commander Augenblick, according to your previous testimony, is that correct?

A. That is correct, sir.

Q. Do you know what disposition was made of the tape relating to Airman Hodges?

A. That I do not know, sir.

Q. Will you describe chronologically what procedure you went through, if any, in disposing of the tapes which were made of these interviews so that we can try to find out what might have happened to the tape of Airman Hodges, assuming it is not there, which we will shortly find out?

A. Yes, sir. The tapes that I took of the interview of Airman Hodges followed by the interrogation of Commander Augenblick. Those tapes were delivered, to the best of my recollection, to ONI Headquarters on the 12th of January several hours after the interrogation had been completed. The morning of the 12th of January—delivered those to ONI Headquarters at the Service Center, Arlington, Virginia.

Q. Now, to the best of your recollection, was there a distinct tape of the interview of Hodges?

A. To the best of my recollection, there was, sir.

[99] Q. What disposition did you make of that tape again?

A. The tape on Airman Hodges and the tapes of Commander Augenblick, with which I was concerned, were together and delivered at the same time in a package.

Q. In the same box or separate box?

A. Separate box. One tape per box.

Q. In a composite package?

A. In a composite package; three tapes in boxes with a rubber band.

Q. Whose physical custody did you deliver these tapes?

A. I delivered these tapes into the physical custody of Mr. Ted Fason at ONI Headquarters.

Q. Did you actually give them to Mr. Fason or did you give them to someone else? Were you given any instructions by Mr. Fason whether or not to give them to someone else?

A. No, sir. To the best of my knowledge, I handed them directly to Mr. Fason.

Q. That was the end of your custody?

A. That was the end of my custody until the present time.

Q. Are you able to identify which tapes you made of the interview of Commander Augenblick?

A. As I said, I have not had a chance to listen to them. I'm pretty sure I can identify them properly. Now, there are two additional tapes there in the back of the recorder concerning interviews. Those tapes are not concerned with my interrogation.

IO: What I propose to do is ask Mr. James to play these tapes by first eliminating the ones that he can't identify. Unless you desire to hear them, and by playing them sufficiently so he can identify the ones relating to the distinct interview, then take them off. In other words just [100] to narrow it down to the tapes that were made on the night of the 12th which he made so he can identify which tapes he made and which he didn't, then to play those tapes, and except for purposes of being able to un-

derstand them—I mean if he can identify voices, if he wants something replayed because it is garbled or something like that—to play them through to determine whether or not there is anything you desire transcribed in whole or in part, or after that, to determine whether or not I, as investigating officer, or you, as counsel, desire parts of any particular tape transcribed. I don't propose to have the reporter copy the entire thing in the record as we go along, other than that part which Mr. James identifies the various voices on the tapes.

IDC: I think that's probably as good a way as any, yes, sir.

IO: You are still a witness, Mr. James, but you may have the freedom of moving about the hearing room for the purpose of identifying and playing these tapes.

Mr. Kendrick, do you desire to ask any questions?

Questions by IDC:

Q. We were more or less curious, Mr. James, do you recall the figure that you stated at some point or another of the number of tapes there were?

A. Which tapes, the ones that I took?

Q. Right?

A. To the best of my knowledge, there were three.

Q. Three of these spools?

A. Three spools.

Q. And there were three that you delivered to Mr. Fason?

A. Yes, to the best of my knowledge, I did, sir.

Q. That included Hodges' interview too?

A. That included Hodges' interview.

[101] Q. In other words, there was one of his interviews?

A. Right, sir.

Q. There were two separate tapes concerning the interview of Commander Augenblick?

A. That is correct, sir. This is the first tape of Commander Augenblick's interview (pointing to the tape on the recorder).

Questions by IO:

Q. Which tape is this that you are about to play?

A. This I haven't heard. It is possible that they have been interchanged in the box, but I assume this is the first tape of Commander Augenblick's interview.

Q. That you made?

A. That I made.

Q. The morning of the 12th?

A. The morning of the 12th, beginning approximately four o'clock in the morning of the 12th.

(One tape was played on the recorder)

Questions by IO:

Q. Am I correct, Mr. James, in assuming that this is the first tape that you made on the night—in the early morning of the 12th of an interview between Commander Augenblick and Mr. Mendelson of the ONI?

A. That is correct, sir.

Q. There is another tape?

A. There is another tape.

IO: Is there anything that you would like to go into as far as this is concerned?

Questions by IDC:

Q. Do you recall physically removing the tape which was taken of Hodges and putting it in a box or hanging it up on a nail, or whatever you do while awaiting it to be transported and then putting in a fresh tape on for the interview with Commander Augenblick?

[102] Q. I'm sure—I can't remember the details as to the actual procedure while I was operating the machine, but I would have taken the other tape off, and did take it off, and put a brand new tape on.

Q. This has run approximately forty minutes. There is evidence to the effect that that interview with Hodges took roughly maybe twenty minutes, but would it not be the usual practice to just continue on that same tape, it being obviously unused—I mean, a part of it being unused to record the first part of the interview with Commander Augenblick?

A. I see what you mean—just continue the interview on the entire tape. It is possible. I usually differentiate. I used one tape for each individual interrogation just for the matter of keeping things straight. I use a separate tape for each individual interview.

Q. Mr. Fason discussed the matter with us. He said that these were two hour tapes; but this is now exhausted, although there is still room on the plastic part for additional tape. Do you care to comment on that?

A. My understanding is that these are one hour tapes. He may have meant two tapes for a total of two hours. They are considered one hour tapes, if they are completed tapes. To my knowledge it is a one hour tape, that particular tape there.

Q. Well, it has not run an hour in its transcription here?

A. I didn't check the time. It is ten after—approximately fifty minutes. Wasn't it close to fifty minutes?

Q. I lost track—somewhere between forty and fifty?

A. I can't speak as an expert. My understanding—we consider these one hour tapes. They run approximately one hour. As you see here, there is some additional room for additional tape. Now, some tapes possibly can be broken or tape removed, but this to my understanding would be a one hour tape and should be.

[103] Q. Now, on the reel as it is now wound up on the receiving end, is it possible to splice in or splice out tape?

A. That, I couldn't say. I have never seen it done. I don't know if it is possible. I couldn't comment on it.

Q. But there is no marking or indication that that is the terminus of the tape, is there?

A. No, there is no marking on the tape to terminate the tape. This footage—this is apparently 553 feet. There is a time chart on here (reading from the box). I don't know if I can comment on that. As I say, I'm not an expert or actually an authority on the tape. My only work is the running of the tapes and taking them. You notice the time. These are apparently dual track tapes as I was told by the soundman in our office. It may have been on the other track, and then I would have to reverse it.

Q. How can you determine that that is a dual track tape?

A. I was told we could reverse the tapes and in doing this we get on the other track.

Questions by IO:

Q. Is it possible there is something on the other tract there?

A. No, there wouldn't be.

Q. In a dual track, it records two separate items, is that correct?

A. Well, that I guess would be possible; it would seem logical. There again that I can't comment on. I don't think so. To my knowledge, it doesn't seem you could have two recordings on this one tape.

Q. On this particular evening, did you record one item on that tape, or did you use separate tapes to record the interview of Hodges and Commander Augenblick?

A. I used separate tapes. This tape would be a continuation of the interview.

[104] Questions by IDC:

Q. This second one?

A. Tape No. 2.

IO: Let the record show the witness is holding up a separate tape than the one on the machine.

Do you want to play the other one or not?

IDC: I wonder if we may have a five minute recess?

IO: Yes. The proceedings will recess for five minutes.

The proceedings recessed at 1115, 17 July 1961.

[104a] Joseph C. Browne entered the hearing room and sat at the reporter's table at 1115, 17 July 1961.

IO: These proceedings will resume. All persons present when we recessed are again present with the exception of Mr. Arena, reporter, who has been replaced by Mr. Browne, reporter, who was previously sworn. Mr. Browne is reminded that his oath previously taken it still binding. Do you understand, sir?

THE REPORTER: Yes, sir.

IO: Very well. Since we have played the initial tape, I believe I will now turn the witness over to the defense for whatever further proceedings he desires at this time.

IDC (Mr. Kendrick): Thank you, sir. I would suggest, if it's agreeable with the investigating officer, that we go ahead and hear the second tape.

IO: Very well. Proceed.

The witness Louis R. James placed one tape on the tape recording machine and played it aloud in the presence of the Defense Counsel, Individual Defense Counsel, Assistant Defense Counsel, Interested Party, and the Investigating Officer.

IO: Mr. James, for purposes of identification, that was a #36 on that reel, wasn't it, sir? I am referring to the reel, sir, that you just finished playing.

THE WITNESS (Mr. James): Sir, that was the reel number, as shown on the reel. Actually, sir, the number of this is #19.

IO: Number 19. Is that your identification number, sir?

A. That was P-19 or Reel #19.

IO: And, sir, Reel #19 was the one that you previously played?

A. Yes, sir.

IO: Now, sir, the one that you are going to play now is what . . . . ?

A. Reel #19. I am sorry, it's Reel #18, sir.

IO: Very well. Proceed, Mr. James, if you will.

The witness Louis R. James placed one tape on the tape recording machine and played it aloud in the presence of the Defense Counsel, Individual Defense Counsel, Assistant Defense Counsel, Interested Party, and the Investigating Officer. After approximately three minutes of playing this tape the Investigating Officer interrupted the proceedings as follows:

IO: Counsel, we will recess for about five minutes while I receive an important telephone call, please. Is that agreeable?

IDC (Mr. Kendrick): Yes, sir.

DC (Cdr Windus): Yes, sir.

The investigation recessed at 1128, 17 July 1961

The investigation was called to order at 1138, 17 July 1961

IO: These proceedings will resume. All persons who were previously present are again present. Would the witness Mr. James like to back the tape up just a little bit, sir?

THE WITNESS (Mr. James): Yes, sir.

The witness Louis R. James resumed playing the tape. After approximately twenty minutes, the defense counsel requested the recorded tape be stopped.

IDC (Mr. Kendrick): May we have a short recess, sir.

IO: Yes. These proceedings will recess for five minutes.

The investigation recessed at 1155, 17 July 1961

The investigation was called to order at 1200, 17 July 1961

IO: These proceedings will resume. All persons who were present at the time of the recess are again present. Mr. James, continue playing the tape, and you might back it up a little.

The witness Louis R. James resumed playing the tape.

THE WITNESS (Mr. James): Sir, that completes this one.

There was a brief discussion between the Interested Party, Defense Counsel, Individual Defense Counsel, and Assistant Defense Counsel out of the hearing of the Investigating Officer.

IDC (Mr. Kendrick): Parts of that tape weren't too clear, were they, sir?

THE WITNESS (Mr. James): That's right, sir.

[106] IO: I might add for the record at this point that we played the second tape, which also had some recorded, partially unintelligible, apparently unrelated conversation pertaining to another distinct investigation. Now, Mr. James, these are the two tapes that you made, is that correct?

A. That is correct, sir.

Q. You have some other tapes there which pertain to an interview—purport to pertain to an interview of Commander Augenblick, is that correct, sir?

A. That's right, sir, and I picked up these tapes when I picked up my two tapes this morning at ONI Head-

quarters, and I have never heard these and I am not clear as to what these are other than what the record says. I never heard these and I did not not take these (exhibiting).

Questions by the defense (IDC):

Q. Mr. James, you have been very candid with us. Can you tell us where in the world is the tape on Hodges?

A. I have no knowledge of that tape, sir.

Q. But you know definitely that you made one, don't you, sir?

A. I have a recollection and I feel certain.

Q. And you know also that you surrendered it to some superior?

A. Superior; right.

Q. At ONI?

A. Yes, sir.

Q. That's your best recollection, that you did physically release custody of it to Agent Fason?

A. Yes, sir.

Q. If there was testimony to the effect that he instructed you to turn that over to either a Mr. Scinta or a Mr. Lynch, would that change in any way your recollection that you have, sir?

A. No.

[107] Q. In other words, sir, it is your best recollection that you did in fact?

A. My best recollection.

Q. That you did in fact give them to Fason?

A. Period.

Q. Period. Now I see.

A. No corrections to transfer them or to transport them to anyone.

Q. Do you recall on that morning when you delivered them your going to any other offices in the building?

A. I can't say for sure. Possibly I did. Oftentimes in going to ONI Headquarters I will stop in another office. Being acquainted with most of the agents there, even some of the administrative people, I oftentimes stop and chat. I may have gone to another office after leaving Mr. Fason's office. In fact, I can't recall.

Q. Do you recall having business with anyone else over there that morning?

A. That morning? No. I would have had no other business with the exception of my connection with this investigation, and I wouldn't have had any of my own, only investigative work to handle that morning.

Q. Where is Mr. Scinta's office with regard—and I am speaking physically located—to Mr. Fason's office, sir, or rather I should say where was it at that time, if you recall?

A. At that time Mr. Scinta's office has since been moved, the physical placed was moved to the second floor. I think that's where it's at presently. I can't tell you when that move took place. Now I go there so infrequently. Mr. Fason's office was then, and still is, on the third deck of the Navy garage.

[108] Q. Navy what?

A. At the Navy Arlington Service Center, at the garage, inasmuch as the vehicles are processing, being at the south end of the building on the third deck. That was Mr. Scinta's office and formerly was on the same deck, on the same floor, third floor.

Q. Fairly close, or some distance?

A. Fairly close. There was a large hall as you get off of the elevator, or exit from the stairway onto the third floor there is a large hall and the rooms are not open to view. You walk into separate rooms of course. Then there are a few open doorways, but most of them, due to the necessity of the work that's done there, they do have two doors. And as you walk off of the elevator his office would have been to the right.

Q. Fason's?

A. Mr. Fason's office would have been on one side of the building. Mr. Fason's office would have been on the—well, that would, of course, depend on how you are getting off of the elevator. Mr. Fason's office is on one side and Mr. Scinta's office was on the opposite side of the building, and there was a move at some time in the past. Mr. Scinta's office moved subsequent to February, I think, and is when that change took place. But my business in headquarters, my visits, are quite infrequent, maybe once a

month, maybe once every three months. It just depends. I do not visit that office frequently. I do not now know where all of the offices are physically located. I only know where the ones are that I am just concerned with, and I might have visited Mr. Scinta's office. I do, at times, stop in his office, and at other times I do not.

Q. Could you say definitely, in fact, that you do not remember however, if you did make a visit even, that you did not deliver the tapes directly to Mr. Scinta?

A. Can I say "definitely not?"

[109] Q. And can you also say definitely that you did not deliver them to Mr. Lynch?

A. I can say definitely I did not deliver them to Mr. Lynch.

Q. Well, sir, when you picked up these tapes this morning, you picked them up from the ONI Headquarters?

A. Right, sir.

Q. And who delivered them to you then?

A. This morning?

Q. Yes, sir.

A. Mr. Glenn.

Q. Glenn?

A. Glenn—Agent Glenn.

Q. And in whose office is he?

A. Sir?

Q. Yes?

A. Mr. Glenn? There again I am not too sure how these offices are divided. Mr. Glenn is in Mr. Ralph Morgan's, and that has to do with the sound and technical equipment office and is where they maintain a storage vault for these offices. Mr. Glenn's office is located there and he knew about the reels and turned them over to me.

Q. Was there any discussion as to where this additional tape with regard to Hodges was or what had been done to look for it or any discussion regarding it?

A. Discussion between myself?

Q. Yes, sir.

A. And Mr. Glenn?

Q. Right.

A. No. Except that he told me these were the only tapes that had been turned over to him for storage, the

four tapes, and of course, immediately I was not aware of these two tapes here (pointing), to be honest. When I [110] got there I was not aware of these two tapes.

IO: By these two, you mean the two additional?

A. The two additional.

IO: And not the two that have been played?

A. Not the two that have been played, but the other two additional that were taken on another date of which I was not aware of until this morning, in the package of four, and then I was told. These were the only tapes that were given to him for storage, four tapes. He knew of no other tapes.

Questions by the defense (IDC):

Q. Did you, just out of curiosity, say "I wonder what happened to the other one?"

A. Well, I think I asked him if there was an additional tape. I checked my record to see if my tapes were there. The other tape was not in that group. I checked these two tapes that were not mine to see if possibly one of them was my tape, my first tape, and I checked the cards. Apparently those were both concerning the second interview, and the numbers don't correspond, so those were not my tapes. I have no explanation of it as to what might have happened.

Q. Have you discussed with anyone, inquired of anyone, as to what possible disposition has been made or might have been made of this third tape that you took?

A. No, other than Mr. Glenn. I briefly talked to Mr. Fason this morning before I left, telling him that I picked up the tapes inasmuch as he is supervising agent there, and this was handled by one of the agents in his office, under his supervision, at times, and Mr. Mendelson being under Mr. Fason's supervision, at times; that I had picked up the tapes; that I was going to the court-martial building with them.

[111] Q. Did you inquire of Mr. Fason this morning anything about his recollection?

A. I believe I did ask him if he recalled the additional tape on the airman that I had brought to him and handed to him that day in a complete package. And to the best of his knowledge, he couldn't recall. He recalled my de-

livering the tapes to him, but not what the boxes contained.

Q. You say he did recall?

A. I believe he recalled my delivering the tapes to him that day, but as to any further identification of the tapes he said, he couldn't recall.

Q. He didn't at any point say "Louie, you didn't deliver these things to me?" Don't you remember that, sir? Did he say anything like that this morning?

A. Not that I recall; no.

IDC (Mr. Kendrick): May I have just a second here, sir?

IO: Certainly.

The Individual Defense Counsel, Appointed Defense Counsel, Assistant Defense Counsel, and the Interested Party, conferred out of the hearing of the Investigating Officer at counsel's table.

IDC: I don't believe we have any further questions of Mr. James.

IO: I have a couple of questions, counsel.

Questions by the Investigating Officer:

Q. To what extent did you discuss with Mr. Fason the actual disposition of these tapes this morning—to what extent? Do you recall very specifically what was said by each person—by yourself and Mr. Fason—or do you think you could paraphrase what was said?

A. I talked to him just briefly, a matter of a few minutes. I believe I asked him if he recalled my bringing the tapes over that particular day, and I am pretty sure that he said he did recall that I had delivered them to him.

[112] Q. Did he say he recalled you delivered them to him, or did he recall you bringing the tapes over?

A. No, I believe he recalled that I delivered the tapes to him physically. He saw the tapes at the time. Of course he didn't make any examination. And if he had, I am sure that I would have explained the tapes setting out that "this is tape so and so, and these are the tapes that were involved in the case . . . ." Of course he was well aware of the case by that time, prior to my coming

over there. And I would have briefly said "Here are the tapes that I took of the interrogations this morning, with my record with the tapes." I may have pointed out—I probably did—I am sure I just didn't say "Here are the tapes." I would have explained what case and what the tapes involved. My purpose in taking them to them would have been primarily because the agent who handled the case, Mr. Mendelson, ONI Headquarters, under Mr. Fason's jurisdiction. I would have handed them directly to Mr. Mendelson—Agent Mendelson inasmuch as he was primarily concerned with them and it would have been the usual procedure. I would have handed them directly to him. However, as I recall—and I am pretty certain of this—on the morning that I went over there this would have been oh, I would say, in the vicinity of 11 o'clock or 1130 that morning.

Q. Of the 12th?

A. Of the 12th. Mr. Mendelson, I believe, was still present at ONI, but he was in conference with someone. I can't say who, but he was not available and there was no reason for my staying there any additional time waiting for him. I didn't know how long he would be in conference and I had, of course, handed them to his superior. I would have handed them to whoever might have been the supervising agent, and in this, sir, it was Mr. Fason. I probably would not have left them indiscriminately with another agent although we might do that. I would have given them to somebody in authority or somebody in charge of that office to make sure that they got to Mr. [113] Mendelson. I know Mr. Fason quite well. I have worked for him in the past and there wasn't any requirement that I explain to him what the situation was. I mean I would leave it with him. And at that point, I had no control over the tapes, my temporary control.

Q. Your purpose was to get the tapes to Mr. Mendelson?

A. Right.

Q. Since he was not available you left them with Mr. Fason knowing that Mr. Fason was Mr. Mendelson's superior?

A. That is correct, sir.

Q. You left the tapes in Mr. Fason's office as far as you are concerned?

A. As far as I am concerned—left them in his office.

Q. Suppose there was testimony that Mr. Fason told you to take them, maybe, to someone else, and all the officers did was to look at the boxes and generally have a discussion? How would you explain the discrepancy in the testimony that you left them with Mr. Fason and that Mr. Fason said you didn't, that he said you gave them to so and so?

A. That he may have said "You delivered them to so and so?"

Q. Yes.

A. I couldn't explain the discrepancy in his recollection or whoever's recollection we are referring to at that time. My recollection is different. I am thoroughly certain of my recollection being as it took place, and he ordered me or asked me in this case to deliver the tapes to another party I am sure I would have carried out his request.

Q. This wouldn't have been anything unusual? Would this have been something unusual and made an indelible impression on your mind? Are you saying that your recollection in this matter could be inaccurate as to just as exactly where you put them, or is it that the other person's recollection could be inaccurate?

[114] A. Well, I don't want to call the other person incorrect in their recollection. Then again I don't want to say that I am one hundred percent correct inasmuch as this transaction has been over six months now. I didn't make any written note at that time of this particular morning that I truly turned them over physically to Mr. Fason the tapes and received a signed receipt. That would not be the case. This was the first instance that I had any occasion to take tapes from my office to ONI Headquarters and deliver them to an individual there, an agent. This was the first instance that I have ever done any of this or anything that was related to this beforehand. I have had no occasion to have done this before.

Q. Well, sir, does it or does it not refresh your recollection that you may have delivered them to someone else under Mr. Fason's instructions?

A. It doesn't sound . . . it doesn't jibe in with . . .

Q. (interrupting) Your recollection?

A. Or even with the rest of the facts, as I recall them. I am fairly certain inasmuch as that particular day stands out in my mind. It's not just like a general day of investigation inasmuch as my work, having worked through the night, I was finished with my investigative work. I think I had instructions, as I recall, from my supervisor that I didn't have to carry out any further investigations that afternoon. I was given the afternoon off as I had been up the previous night. I feel certain that my recollection about going over and delivering the tapes to him is correct. However, there is the possibility that might exist that he could have asked me to deliver the tapes to another individual. If he would have I am sure I would have although I can't see how that request would be actually involved inasmuch as Mr. Mendelson is under his supervision and he would naturally be seeing Mr. Mendelson in the other office. However, some other administrator might be concerned with the tapes in one of the other offices.

Q. Very well. Assuming that there was such testimony, this wouldn't change your version? You would just say. . .

A. (interrupting) A discrepancy.

[115] Q. Conflict and discrepancy in your recollection?

A. Right, sir.

Q. As far as you know, you have no knowledge of the present whereabouts of any of the tapes, is that correct,—any other tape, so to speak?

A. No, I have no other knowledge. I have searched my own possessions. I do keep tapes in my own cases in my desk, but I know that this one tape is not present in my desk and I believe, in the past, and sometime ago, searched our central storage facility of record in this case for that particular tape to see if it was there and I did not see it. To the best of my knowledge, they were always in ONI hands until up to the point when I left Mr. Fason at that time until I picked them up this morning at ONI.

* * * *

[118] Let the record show that Mr. James the witness is again present for purposes of playing the tapes. You are

reminded, Mr. James, that you may be asked about any matters pertaining to this case. You are still a witness and you are still under oath. Do you understand that, sir?

THE WITNESS (Mr. James): I understand that I am still under oath, sir.

IO: Very well. For purposes of the record, we are going to listen to a tape made in a separate interview of Mr. Augenblick—Commander Augenblick, the interested party in this proceedings. Mr. James, however, did not participate in making these tapes, is that correct?

A. That is correct. I did not make this tape.

IO: Very well, proceed.

The witness Louis R. James placed one tape on the tape recording machine and played it aloud in the presence of the Defense Counsel, Individual Defense Counsel, Assistant Defense Counsel, and the Investigating Officer.

[119] IO: All right, what is the next one, Mr. James?

A. The next one, Number 2, is the continuation of this first tape, sir.

IO: Mr. James, would it be a fair description for the record here to say that we have now completed one tape of a subsequent interview subsequent to the time that Mr. James recorded his tape, that now we are going to listen to the second tape of a second interview, a subsequent interview or a continuation of the first?

A. Yes, sir.

IO: Counsel?

IDC (Mr. Kendrick): Right.

DC (Cdr. Windus): Yes, sir.

The witness Louis R. James placed one tape on the tape recording machine and played it aloud in the presence of the Defense Counsel, Individual Defense Counsel, Assistant Defense Counsel, and the Investigating Officer.

THE WITNESS (Mr. James): That's it.

IO: Let the record show that there was no information on the second tape pertaining to an interview of Commander Augenblick.

THE WITNESS (Mr. James): According to the record, written record for this particular tape, this particular interview, Tape Number 1, is one hour, and Tape Number 2, three minutes. Now this tape, Tape Number 2 (exhibiting to the investigating officer) was just played.

IO: Yes. However, sir, on this particular tape, Tape Number 2, we could locate nothing concerning an interview of Commander Augenblick or Airman Hodges.

THE WITNESS (Mr. James): I can try again, but I find nothing in that respect—no, sir. Does the reporter know how to back this up and find portions of recorded material?

IO: Does counsel have any objection?

DC: No, sir.

IDC: He might try.

The reporter did as directed.

THE REPORTER: I find nothing here, sir, as regards the interview in question.

* * * *

[121] IO: This proceeding will come to order. Let the record show that upon recess Mr. James removed the equipment and tapes from the hearing room; that Commander Augenblick arrived and is now present; that all parties are present now with the exception that there are not witnesses now present.

Does the defense have any further proceedings or any further witnesses?

IDC: I believe not, sir.

IO: At this point I remind counsel that the party may submit a statement through counsel, sworn or unsworn, should they desire. Is there any desire for any statement to be made to the hearing officer at this time, sirs?

IDC: No, sir.

DC: None.

IO: Let the record show, with the expressed consent of the interested party, the tapes were examined in the absence of Commander Augenblick. For my report, I propose to submit a letter report of which I have a rough draft here (exhibiting). I would like to submit same to counsel.

For the record, I have no knowledge of this case; have had no prior proceedings; have had no access to the prior

proceedings that were conducted here or elsewhere. The record of the previous proceedings have not been tendered to me by the defense or tendered to me by any representative of the Government. I have not sat in on this case myself before. Because of the nature of these proceedings, I submit that the connotation of the appointing order that [122] I submit such findings, opinions and recommendations as I deem appropriate be resolved that I submit no findings, opinions and recommendations because, as I understand, the purpose and objective of the defense in this proceeding was to examine certain witnesses, under oath; that their testimony was to be recorded verbatim; that they were to explore certain avenues of approach in certain discovery. These objectives have been accomplished. I intend to submit no findings, recommendations, opinions, et cetera. Consistent with this, counsel, I have a rough draft of my report. I would like the defense, during a five minute recess, to examine this report and then prepare to discuss anything further that they desire in this respect. I hand this rough draft copy to you (handing).

We will recess for five minutes.

The hearing recessed at 1550, 17 July 1961.

The hearing was called to order at 1555, 17 July 1961.

IO: The proceeding will come to order. Let the record show that all parties who were present prior to the recess are again present with the exception that there are no witnesses present. Has counsel had an opportunity to examine the proposed report, sir?

IDC: I have, sir.

DC: I have, too, sir, and it conforms with our views.

IO: I will have to ask, does the defense expressly waive findings, opinions and recommendations in the report made by the investigating officer?

IDC: We do, sir.

IO: Are there any further proceedings to be conducted?

IDC: We have nothing further, sir.

IO: Very well, sirs, the hearing is adjourned.

The hearing adjourned at 1556, 17 July 1961.

* * * *

jury results, former jeopardy cannot be successfully used by the defense. A well-recognized exception, of course, is where the accused, having been convicted, goes through appellate procedures which result in a reversal of the original trial, and there again, the law is clear that he has not been in jeopardy. Part of the thinking there is that he has, by reason of his own motion, by virtue of his own motion, that the original trial resulted in, or rather the reversal came about accordingly that he has not been in jeopardy. Now, we have specialized situations in the military as Mr. Kendrick pointed out. The cases frequently say some supervening necessity requires the termination of the trial at one stage and reference to another court and cases—plenty of cases in which that has occurred and where jeopardy has been held not to have attached. For example, let's visualize a court which is convened under combat conditions where the tactical situation changes so that the place where the court is sitting is over-run or something of that order. I recognize there that if the trial has to be terminated, it can be re-convened at another time. There's one case, the Shilling case, which is in 7 USCMA 482 and 22 CMR 272. They had a mechanical failure in the recording machine that the reporter was using and it became evident that the thing had been out of order for some time, although nobody knew it and as a consequence it was going to be impossible to come up with a verbatim record which was required and it was said there that there was sufficient gravity so that it was proper to terminate the original proceedings and refer the case to another court at another time. Now, Article 44c, it seems to me, makes it plain that where evidence has been received, no finding has been made, jeopardy attaches if the proceeding is either: a) dismissed, or b) eliminated, either by the convening authority or on a motion of the prosecution for failure of evidence or witnesses without any fault on the part of the accused and it seems

to me that that is what Article 44c says. Now, in this case, there plainly was no failure of evidence; all witnesses, as a matter of fact, the record will show that at the stage of the proceedings when this motion for dismissal was treated by the law officer as a motion for—what did he call it—.

* * * * *

[51] DIRECT EXAMINATION

Questions by the prosecution:

Q. State your name, grade, armed force, and the duty station to which you are now attached.

A. Airman Third Class HODGES, James Orland, Jr., stationed at the 1001st Civil Engineer Group at Andrews Air Force Base, Washington 25, D. C.

Q. And you are a member of the United States Air Force?

A. Yes, sir.

Q. Do you recognize the accused?

A. I do.

Q. Do you see him in the courtroom?

A. I do, yes sir.

Q. If you do, point him out?

A. The Commander to my left (pointing to the accused).

Q. What's his name?

A. Commander Augenblick.

[52] Q. Now, going back to the 12th of January 1961, can you tell us where you were in the evening, rather the early morning of the 12th of January?

A. In a White Tower Restaurant close to the corner of 11th and Pennsylvania Ayenue.

Q. Where?

A. Washington, D. C.

Q. Now, about what time would you say this was that you were in the White Tower?

A. It was right after midnight.

Q. What were you wearing?

A. I was wearing my Class A blue uniform.

Q. That's an Air Force blue uniform?
A. Yes, sir.
Q. And what were you doing in this White Tower?
A. Waiting for my bus to Andrews.
Q. Well, were you eating?
A. I had a cup of broth.
Q. Where were you physically located within the restaurant?
A. I was seated at the counter about midway down.
Q. Now, at that time what occurred?
A. Commander Augenblick came in civilian clothes and sat down a couple of chairs from me.
Q. And had you ever seen this man before?
A. No, I hadn't.
Q. Now, tell us what occurred at that point?
A. He said, "Hello." I don't know who spoke first, and got into a conversation. He asked me where I was going—something like this. I told him I was waiting for my bus to Andrews. I had about an hour to kill before it got there. I notice he'd been drinking by his breath. He ordered a cup of coffee, talked more. He said he borrowed his uncle's car—had his uncle's car—and he was just in town and wondered if I wanted to go with him.
[53] Q. Did he give any indication of where?
A. Said go pass the time until my bus came.
Q. Now, what followed that?
A. I accepted the ride, and we walked from the White Tower Restaurant to his car which was parked about two blocks from the White Tower Restaurant.
Q. Now, how long had you been in that restaurant up to this time, would you say?
A. About a half hour, I imagine.
Q. All right. Now, you left the restaurant with Commander Augenblick and proceeded to his car, and you say that was a matter of a couple of blocks away from the restaurant?
A. Yes, sir.
Q. Now, can you describe the car?
A. The car was a '57 light colored Chevy.
Q. Did you take notice of the registration tag on it?
A. No, sir, I didn't.

Q. All right. Now, what happened? You got to the car, what occurred then?

A. We both got in the car and started driving. I don't know where we drove to.

Q. How long were you driving?

A. About five or ten minutes.

Q. You say you don't know where you went?

A. No.

Q. Can you give us a description of the area that you went through?

A. Went—I wasn't familiar with the town at all. We come across a bridge over to an area with a cyclone type of fence, some kind of old buildings, temporary buildings behind them, and on the right side of the car where we stopped there was a field with trees and then water beyond it.

[54] Q. All right. And you did stop there?

A. Yes, sir.

Q. Now, in the course of that driving, was anything else said?

IDC: I don't believe there has been any testimony of anything having been said.

TC: I withdraw that.

Q. Was anything said from the time you got in the car until you ended up at this place you just described?

A. He explained to me that the car was borrowed from his uncle, he was staying with his uncle, and asked me if I wanted a drink he had in the back. I didn't want one. He asked me if I'd like to spend the rest of the night there and catch the bus in the morning at his uncle's house. I told him I didn't want to. So, then he kept on driving, said he was tired. We stopped along a road to sleep.

Q. The place that you've just indicated?

A. Yes, sir.

Q. Now, tell us what happened from then forward?

A. He parked the car, turned off the lights and motor. Commander Augenblick leaned over toward his left, toward the driver's door, crouched down as if to sleep and start to sleep, and he sat back up and asked me if he could use my head as a pillow. I let him, he put his head in my pillow—put his head in my lap; and he turned over,

placed his hands on the backside of my legs. He asked me if everything was all right. I gave him—I said, "Yes," and moved his hands from the back of my legs around toward the area of my penis, massaged there. And he told me to take my pants down. I refused this. I unzipped my fly. He took hold of my penis and stroked it until it was erect and placed it in his mouth. Shortly after that, I told him I'd like to go down to Andrews Field. So, he started to sit up, and at that time a light came through the window of the automobile. Two policemen standing there ordered us out. They asked us for identification and arrested us and took us down to the police station.

[55] Q. Now, let's go back. You saw two policemen there, and they ordered you out, and what occurred then?

A. They took us out behind the car and asked us for identification.

Q. And what happened as a result of that?

A. I showed them my identification, and they turned and asked Commander Augenblick if he was in the military service. He was in civilian clothes at the time. He said, yes, he was, he was a Commander, and the officer replied he was a Commander, and—

Q. Well, did he furnish identification?

A. Yes, he showed them identification. They showed identification to us.

Q. Did Commander Augenblick give the police some identification?

A. Gave them identification about military.

Q. All right. Then what happened?

A. They had us get in the car and follow them down to the police station.

Q. Now, what car did you get in?

A. Got back into the Chevy, Commander Augenblick's.

Q. And the police, both returned to their car?

A. Yes, they went on ahead and we followed them.

Q. Now, did anything occur in the course of the drive from that point to the police station?

A. He told me that they didn't have anything on us. They couldn't prove anything. He said we should have a story that would match. He said we stopped there to take a leak and to get some rest, and that was what we were

supposed to tell the officers when they questioned us. He had me repeat this after he had said it a number of times on the way to the station, saying that they couldn't prove anything, they didn't have any grounds.

Q. What was your reaction to this?

[56] A. I went along with him. I repeated what he said to me.

Q. All right. Now, after a period of time you arrived at the police station. How long would you say that was? How long did it take to get there?

A. I imagine it didn't take any longer than ten, fifteen minutes, if it was that long.

Q. Incidentally, do you remember what the precinct number of the station you went to?

A. I believe it was the Third Precinct.

Q. Now, when you got to the police station, what occurred?

A. They took us and had us booked and write our name down in the book they had there, put us in the other room behind the entrance.

Q. And how many people were in the room?

A. About two or three other officers in there in the precinct itself when we came in, I think.

Q. By officers do you mean police officers?

A. Police officers.

Q. What occurred in that room?

A. In the room that we were sent in?

Q. Yes.

A. One of the officers, I don't know if he was military or civilian, was standing off where we could see him but far enough out of range where he couldn't hear what we were saying. He had me repeat the same story.

IDC: I submit this is not responsive to the question, Your Honor.

TC: The question was: What occurred in that room?

LO: I believe it is responsive. You may proceed.

WITNESS: He repeated the same story again to make sure it was correct between two of us. Then when the officer, one of them came in—

[57] Q. Now, by officer, this time you mean what?

A. It was a police officer, I don't know whether it was military or civilian, but it was an officer of law.

Q. All right, go ahead. He came in then what?

A. Commander Augenblick said out loud that "nothing happened, did it," and I answered, "No, it didn't."

Q. Okay. Now, how long did you stay there at the Third Precinct Station?

A. Maybe a half hour I was there. Then they turned us over to the military police.

Q. And the military police did arrive at the Third Precinct Station?

A. Yes, they did.

Q. And you went with them somewhere?

A. We went down to the Armed Forces Headquarters here at the Weapons Plant across the river.

Q. Now, did you—what vehicle did you go to the Weapons Plant in?

A. I rode in the Armed Forces vehicle. Commander Augenblick followed in his Chevy.

Q. All right. Now, when you got to the Armed Forces Police Headquarters, what occurred?

A. They put us in separate rooms and waited there until the OSI and ONI came, and they took me after they arrived to a back conference room and questioned me orally about what had happened. I made an oral statement to them, and then they took me back and said they was going to interview or question Commander Augenblick. And after that, they took us—took me back to OSI Headquarters where I made out a written statement.

Q. How long would you say you were at the Armed Forces Police Headquarters?

Q. I'd say about two hours.

Q. How long did the interrogation of you that occurred there, how long did that last?

A. About fifteen minutes.

[58] Q. Do I understand that you made only an oral statement?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. Then at the OSI Headquarters at Suitland, that's where you went from ASPD?

A. Yes, I did.

Q. How long were you there?

A. I was there another possibly two hours or hour and a half.

Q. And you said at that time you made a written statement?

A. Yes, I did.

Q. Now, in the course of the interrogation at ASPD, can you tell me how many people were present besides yourself? This is just your interrogation, what you know.

A. There was—when they questioned me in the room?

Q. At the ASPD Headquarters over here at the Weapons Plant?

A. There were two men. At the time I thought they were both OSI. They both showed me credentials. I have learned since then that one of them was an ONI.

Q. All right. Now, down at Suitland, how many people were—interrogated you?

A. There were two people, the same OSI man and another man.

Q. And then what disposition was made of you after you made the statement at Suitland?

A. They took me back down to my base and turned me over to my Commander.

TC: I think that's all. You may inquire, Mr. Kendrick.

IDC: At this time, may it please the court, I would like to call upon the Government to produce in open court a recording made of this interview of this witness, together with notes taken at this additional interview by an agent of the ONI.

[59] LO: What is the basis of your request?

IDC: Primarily to enable us to properly cross-examine him on the basis of the initial statements that he has made as opposed to or in conjunction with the testimony which he has made in open court.

LO: At this point of the trial your request is denied.

IDC: May I ask that Your Honor reconsider it in view of the provisions of Section 3500, Title 18, of the United States Code, which I believe paves the way for the authorization and the requirement that the accused in any crimi-

nal prosecution be afforded the access to that section of the Code, and if Your Honor is not familiar with it, I—

LO: Is that the Post Jelky Act?

IDC: I believe the popular name is the Jenks' Act, but I'd like to read that to the court, if I may, and also I would like to present evidence before Your Honor finally rules on it, as I feel that this is essential to the accused's case.

LO: I withdraw my ruling then.

IDC: I refer to Section 3500: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." I submit that we have passed that first hurdle. "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use." And if I may interpose at this point where I have read you what is in parentheses "as hereinafter defined" as to statement, it refers to: "A written statement made by said witness and signed or otherwise adopted or approved by him; or a [60] stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." And the rest of the act has to do with the procedure which should then be followed in the event that the Government elects not to produce such a statement. Now, I may say I would like permission to call witnesses to support this, if the Law Officer feels it is necessary. But the accused is

aware of the fact that a recording was made of the initial interview, a verbatim tape recording, together with notes made by an agent who was present about whom this witness has just testified. We feel that under the pertinent provisions of this act which has in several cases, which I'll be glad to refer Your Honor's attention, been applied to not only the trial by a court-martial as well as a civilian criminal trial. And if there is some question in Your Honor's mind, I would like permission to call—and I am not only willing but desirous of doing it before the entire court, as I feel that the court should be apprised of the facts as they exist.

LO: Commander Hartnett, do you desire to be heard?

TC: I'm not sure what Mr. Kendrick is asking for. If it please the Law Officer, I have a photostatic copy in the former record here somewhere of the statement made by the witness down at Suitland. Is that what you're asking for?

IDC: No, sir.

TC: You don't want that?

IDC: I'm not asking for it. May we restate what it is that I wish, sir?

LO: You may.

IDC: The accused knows that there was made at the time of the initial interview of this witness at the Naval Weapons Plant—and as he has stated here by two men who he had later found out one to be an ONI agent, one an OSI agent—a tape recording of that initial interview, together with notes made by one of the agents, namely, the ONI agent. And it is that that we ask the Government to produce at this time prior to the cross-examination of this witness.

[61] LO: So that you are asking for two things: The recording of the initial interview and notes made by the ONI agent?

IDC: Yes.

LO: Now, I can tell you right now that notes made by the ONI agent will not be allowed because that is not a statement.

IDC: Sir, I believe if you will permit me to present you authority. We have several cases here whereby the very same thing has occurred with regard to FBI agents,

and the court has required the production of them under the provisions of this statute, together with, of course, the very full tape recording as set forth in this Act. I feel that in justice to the position of this section of the Criminal Code, which I have cited to Your Honor, we are entitled to that; and the Government is the one who should produce, it being peculiarly within the control of the Government.

TC: Well, certainly in the first place, I confess that I find myself surprised by the defense's maneuver on the part of the accused because nothing has been said to me in any of the preliminaries of this trial to indicate any request was going to be made.

IDC: I object to the characterization made to the word "maneuver."

TC: I withdraw the word "maneuver." I'm surprised by the request. I do not concede either that there are any such notes or any such records. I don't know that there is any such thing. I have not seen the notes, or I have not seen anything either that is purported to be a recording. I will submit to whatever Your Honor's ruling on this is, subject to whatever power I have to produce them. It maybe in existence, but I don't know.

IDC: May I have one word in response briefly to that.

LO: You may.

IDC: Your Honor, I believe that Commander Hartnett was aware that it was the desire of the accused that two ONI agents who are in this immediate area be available in the event it was necessary to call them today, to-
[62] gether with the fact another one who is temporarily away but simply to see that he would not be on leave so that he would be available to be heard by this court. Now, I assume that the trial counsel is familiar with this provision of the United States Code, and I don't feel that it is incumbent upon the accused, before the Government's case is even spread on the record, to say everything that the accused has in mind by way of his own defense against a serious charge as this. I don't feel that the trial counsel can be heard to say that he is taken by surprise, because he knows that the agents that we asked to be made available are to be held available were the ones involved in this very matter. That was their function, and that's what

they performed. I feel that it would be to the prejudice of the accused that it be denied the production of this recording. And if Your Honor is tentatively opposed to the production of the notes, I would like to be heard further as an authority for that, but I feel that these are matters which are peculiarly within the control of the Government. And if the Government elects to continue with the prosecution, then the accused is entitled to their production.

LO: I would like to inquire if the Government could inquire in this matter say within the next thirty minutes or would you need longer to inquire?

TC: Well, as Mr. Kendrick said, I have made arrangements with the ONI people to see to it that these men are available, and I understood that it was with the possibility that they would be called. Now, I told them in each instance that I would give them reasonable notice of the requirement for their presence, and at this moment I can't tell you one way or the other whether I can get any of them this afternoon.

LO: I didn't mean to have a witness physically present. I mean to inquire into the request by the defense at this time to see, first of all, was there in fact a recording, what the circumstances are, what if any notes may have been taken, and are these preserved, or the reasonable availability of those notes and the recording, if I ordered them produced. In other words, to acquaint us with [63] the background. I think a recess will be in order for you to inquire. I don't want to cut you too short in making the inquiry.

TC: All right. I suggest that we have a closed session of the court before we declare a recess because certain aspects of this thing have been gone into before, and I think it may not be appropriate to disclose all the circumstances to the court. They should be disclosed to you before any ruling is made, so at this point I ask for a closed session of the court with the law officer present and the reporter, in the absence of the court, and then will consider whether a recess is indicated for purposes of having to make any further inquiries.

LO: Is that agreeable?

IDC: Agreeable.

The witness was duly warned and withdrew from the courtroom.

LO: In view of the request of the Government, I think it appropriate to have an out of court hearing again, and we will inform you just as soon as we can proceed.

The court recessed at 1357, 5 September 1961

LO: Let the record show that the hour is now 1358, the same date, and the accused, counsel for both sides, the reporter and law officer are present along with certain spectators.

Inasmuch as the Government has requested a recess, you may proceed.

TC: The entire question of whether such a recording was made and whether one is, if made, in existence now, was gone into at great length in a supplemental pretrial investigation which was conducted at the request of the accused after the completion of the court of inquiry. This entire matter was canvassed, and with the consent of the accused the investigating officer made no findings or expressed no opinions, but he simply presided while the testimony was taken which was in the nature of discovery [64] on behalf of the accused. The accused and defense counsel are perfectly well aware that these things, if there was a recording—and one witness indicated that there—was almost certain that there had been one of Hodges' testimony. Another witness simply didn't know, and nobody could testify where it was, if it existed. Now, if it is the purpose of the defense to produce these men again, have them testify the same way, I suppose it's up to you. But the record of that proceeding will be part of the pretrial record in this case, and it will be in the record. Accordingly, I think I should acquaint you with that much and to see how you want to proceed and inquire from there on. I take it again from the fact that the defense has not disputed me that they don't contest that that occurred?

IDC: I haven't had a chance to speak yet, but I do not dispute that fact. The defense went into this, this is quite correct, on a supplemental pretrial hearing before a single officer called at our request. It was called with regard, keeping in mind the provisions of this Act which I have

read to you. We determined at that time that a recording was made not only of the witness who just testified but comprehensive notes were taken by one of the agents which formed the basis of his later interrogation also on the tape of the accused that same morning. That is in existence, but the recording made of the witness, it is questionable as to where it is. I feel that not only is this court entitled to know that such a recording was made, but I think under the provisions of Title 18 of this Section 3500 that the Government, if it is going to elect to proceed, is duty bound under that section to produce that recording to enable the defense to properly cross-examine this witness. And if it elects not to produce either the transcription or the notes, then I think we will at that time address you, Your Honor, with regards to the alternatives, if the Government fails to produce, as provided under that Act, and as it has been interpretted not only by [65] the civilian courts but in a most recent decision by the Air Force Board of Review. In my mind there is nothing wrong here. These are all provisions which are made under the law for the protection of persons accused of crimes. I believe that we are justified. I don't feel that Commander Hartnett, as the trial counsel in this court, has been taken by surprise in any way by such a request, and we pursue it vigorously and ask that a determination be made as to the availability and possibly then take testimony as to the hands that this went through and what happened if the Government is not able to produce it.

LO: Do you care to cite me the authority concerning Title 18, Section 3500?

IDC: Well, the Air Force Board of Review which is the alternative, which is the relief that we would subsequently seek, is United States against COMBS, which is in this Air Force Court Martial—it is 28 CMR at page 867. Page 866 is where it begins. That involved the unavailability of a transcription made at a pretrial investigation wherein that case the Board of Review took the view that it was so serious that it dismissed the case itself. Several other cases which have been decided have gone so far only to strike the testimony of a particular witness. One such is United States against THOMAS, decided by

the Second Circuit Court of Appeals, in 282 Federal Reporter, Second, at page 191. Still another that was decided—and this has particular reference, Your Honor, to these notes that we have requested—is CAMPBELL against the United States, decided by the Supreme Court in 81, Supreme Court 421. I'd like to refer particularly to this language which I am reading from the headnote now in the case: "Report of interview of government of witness by FBI agent was required to be produced by United States for impeachment purposes if extrinsic evidence should establish that the report was substantially verbatim recital of oral statement which agent had recorded contemporaneously." Of course, in that connection you will agree that you would want to take evidence if [66] Your Honor was of the initial opinion that you indicated that the notes would not have to be produced. Still another case is CLANCY against the United States in 81, Supreme Court decision 45, in which this had to do with signed memoranda of interviews of the defendant by Government agents testifying at trial, even though the memoranda were not made contemporaneously with the interviews. Of course, the memorandum that we have reference to here was, and we would so show to the court if you care to, by the testimony of the agent who took it. Those principal ones we rely upon in support of this position that we have taken.

LO: I think before proceeding any further I would like to acquaint myself with the authority that you have just given me.

IDC: I have them here, if Your Honor would care to read them.

LO: I would like to read them over before I go any further.

IDC: Very well, sir.

TC: I'm to take no action until you have seen them?

LO: That's right. We will have a recess for at least twenty-five minutes, at least to 1430.

The out of court hearing recessed at 1410, 5 September 1961.

LO: The out of court hearing will come to order. Let the record reflect the hour is now 1433, the same date.

Gentlemen, I frankly admit it is going to take longer than the twenty-five minutes I gave myself a while ago to resolve this issue in my own mind. I would like to read more thoroughly the citations which the defense has given me. There is one thing, however, that bothers me somewhat. I would like some clarification on it. I believe the trial counsel indicated that this matter had been the subject of discussion in a special additional investigation of some sort?

TC: Not only was it the subject of discussion, if it please the Law Officer, it was the subject of several days of taking testimony.

[67] LO: Now, I would like to inquire of the defense if I should permit the calling of witnesses concerning this particular issue is the preserved testimony of these witnesses in the initial investigation, would that be any different than the expected testimony that you might expect if the witnesses were called say tomorrow?

IDC: I don't know that they would be any different, sir. The only thought that I had is this: That in view of certain revelations made, we feel that the court should probably have the benefit of that in their consideration of the case too, and the preserved testimony, I don't believe would be adequate to present to the court unless we just sat here and read off the testimony that was taken previously.

TC: Incidentally, along that line, I'm certainly going to object to the introduction of any testimony before this court, before the members of this court. It is plainly the subject for consideration by the law officer, and the law officer alone.

LO: I was about to say it appears to me to be a purely interlocutory matter on which I will rule. I believe that the court members have no business hearing this particular testimony of this particular issue. My thought was that we might be able to save some time here if the defense has no objection of me perusing the additional investigation that trial counsel indicates was held, unless suppose you feel that that testimony is not completely accurate, not as comprehensive as you would expect from live witnesses that might be called. I think first of all I

must determine in my own mind whether or not such statements exist and then if that determination is yes, they do exist, then the second determination which should be made is whether or not I will order them to be produced. I want to study this matter further. I think it will take me at least one hour to read your citations, and I haven't completely read all of them that you submitted to me before. I would like to do a bit of research of my own of this matter, but the problem of the record of the additional investigation, this concerns me. I want to ask the defense particularly about it at this time.

[68] IDC: I suppose the best way I can answer, sir, is that if you feel and so rule that the court is not entitled to hear any of this and that it is purely an interlocutory matter, I respectfully disagree, but I would assume under those circumstances that I probably in all candor can say to the court that the pretrial investigation record would probably be the extent that we could offer through the witnesses testifying in person again.

LO: Well, I might say to you, Mr. Kendrick, when I made that statement a moment ago about this being an interlocutory matter, I was not making a ruling. It was just my feeling at this particular time frankly I don't think I'm in a position to make a ruling of any sort on this matter. I was merely wondering if you, and when I say you I mean the defense, has any objection to me perusing the record of this additional inquiry for my purposes here? In fact, my own feeling is that I would prefer to take this under advisement and inform the court that. We can call the court back and have an adjournment until tomorrow morning. I would like to study this matter further. I thought perhaps I might read over this. That would better educate me to the background, but I did not want to request it of you unless you specifically agree to it.

IDC: May I confer with counsel?

LO: Yes, you may.

IDC: No, sir, we have no objection to Your Honor's perusing the entire record. I think possibly in anticipation of an affirmative ruling by you, could the trial counsel be instructed to have these witnesses physically present tomorrow in the event you decided to take testimony so

that we would not be faced with further delay in obtaining their presence?

LO: I think that would be appropriate.

TC: You want them actually here?

IDC: Yes, sir.

[69] TC: Well, these people—

LO: I would not go along with that all the way. I would suggest to the trial counsel that he inform whatever witnesses—I assume these must be the ONI and OSI agents involved in this case—to stand by or be at a place where they can be called and get here.

TC: Let's clarify this a little bit more, because I want to be quite sure that my position is clear, what my instructions are. One of them is over here at the Gun Factory. He can be here tomorrow morning. He can be here at five minutes' notice. We can arrange that. The second one comes from the Service Center at Arlington. He can be here in a half hour, let's say. The third, if the defense is still thinking of Mr. Mendelson, he is in Norfolk. I will have to make arrangements if you want him. I will have to do something today about getting him here. Now, that's the status of the three people involved. You are not taking the OSI? Am I correct in my understanding that the defense does not now have in mind the OSI agent from the Air Force?

IDC: No, sir.

TC: You do not want Mr. Connor?

IDC: No, sir.

TC: Well those three people, as I understand it, that's the situation with respect to getting them here.

LO: Now, these are the three people that you have in mind, Mr. Kendrick?

IDC: Yes, sir.

LO: Would you please name them for me so I can be sure?

IDC: Agents Mendelson, James, and Fason.

TC: The first one, Mr. Mendelson, is in Norfolk. I talked with him on Friday. Now, I don't mean to suggest that the law officer ought to work overtime. I was going to make a suggestion that it might be that Mr. Kendrick, the defense, in other words, would find that it is possible

to cross-examine the witnesses on the basis of their present information presently available to them. They haven't had any trouble doing that before. They cross-examined them three times.

[70] IDC: I would prefer to rely upon the motion, sir, at this point.

LO: Well, we have this issue presented. I'd like to get it squared away before we proceed. Concerning the instructions to the trial counsel on these agents, I think it is only necessary that you inform agents James and Fason to be available for possible call tomorrow, and also inform agent Mendelson that he might be subject to call, and he would be notified if and when his presence is needed. In other words, merely to be subject to call rather than to be physically present here.

TC: Very well.

LO: I think 0900 or say 0930 is a better time for the court to convene here.

TC: Well, I have that feeling myself because some of them come from distant installations, but it is up to you. If you feel that the time element is such now with this loss of time we are experiencing here that we ought to have that extra half hour, that's satisfactory to me.

IDC: I'm agreeable to the court's pleasure.

LO: I would suggest then that you recall the court, and I will inform them that I need additional time on this particular matter and ask at what time they would prefer to reconvene tomorrow.

TC: I think we ought to resolve this question of uniform too. There was some suggestion that we might wear whites assuming it would have been more comfortable today.

LO: I think we better bring the court back.

DC: Did I understand the law officer correctly that agent Mendelson is to remain in Norfolk?

LO: As of right now, yes.

DC: Actually he was the principal participant. I don't like to be presumptive, but I believe it may be wise to have him available in town. I realize it's an expense and an additional effort on the part of the Government. However, I think it would be wiser to do that rather than

to be faced with the possibility of a whole day's delay tomorrow in the event we do need him.

[71] LO: Well, of course, at this particular stage, I'm completely unaware of the background information on your request. The Government has indicated that they are unaware of the statement or the interview or the recording of the initial interview, I believe, and that they conflict with the testimony of this additional investigation. It is for these reasons that I would like to peruse this record plus to do my own research. If I recall, the Government does not desire to produce the witnesses you request. We have no need for the witnesses. If I rule in favor of you, then the witnesses ought to be produced. I think we will have to be guided in the morning as to what I have found out and what I intend to do rather than make a firm decision at this point. I think it might be better that way rather than bringing the witnesses forwarded. Of course, each of you know better who you intend to call and for what reasons. If the Government feels that this witness might be needed for another purpose, wants to have him here, that's entirely up to him. I don't think I should direct trial counsel to have these three men physically present here tomorrow, not within my present knowledge of the issue.

TC: Can we agree that this is a transcript of the hearing?

IDC: I suppose so.

LO: Well, there is no argument that is a proper transcript?

TC: No, I think not. That's the one that came to my hands. I assume that the defense also has one.

IDC: It appears to be proper.

LO: I would suggest that the trial counsel recall the court.

LO: Let the record show that the hour is now 1449. This will conclude the out of court hearing.

The court was called to order at 1450, 5 September 1961.

PRES: The court will come to order.

TC: All parties to the trial who were present when the court closed to go into closed session are again present in court.

[72] LO: The record of the out of court hearing that was just held will be inserted at this point in the record. Gentlemen, in view of the motion that was made previously and as a result of the out of court hearing just held, I believe that I need additional time to research this matter before I make a final ruling. I would suggest that the court recess until an appropriate hour tomorrow. That is, I ask an hour that is convenient to you. I just want to know what time you would desire to reconvene?

PRES: Would 9:30 or 10:00 be all right by you?

LO: Yes, sir. If you prefer ten o'clock, is that agreeable?

TC: As far as the prosecution is concerned, whatever the court directs is satisfactory.

PRES: Would 9:30 be all right?

TC: That would be all right.

IDC: That's perfectly agreeable.

PRES: At this time, if I may, the court would like to see if every afternoon we could get going around about three o'clock. Is that convenient to the rest of you people? Can we set that time?

IDC: That's perfectly agreeable with us.

PRES: Starting at 9:30, perhaps, in the morning, breaking up about three in the afternoon.

TC: May I ask what the uniform will be?

PRES: The uniform will be whites tomorrow.

LO: That is the tropical whites, long?

PRES: Yes.

LO: Very well, sir. The court will stand adjourned until 0930 tomorrow morning.

The court adjourned at 1552, 5 September 1961.

[73] The court opened at 0931, 6 September 1961.

PRES: The court will come to order.

TC: All parties to the trial who were present when the court closed are again present in court. Let the record show that Ketterer, Personnel Man First, who had been previously sworn, is in charge of this part of the record.

LO: Gentlemen, as I indicated to you yesterday, I decided to spend the rest of the evening and last night considering a problem which had arisen in this case. This is a matter which is properly discussed in an out-of-court

hearing. If you will excuse yourselves temporarily, I think I can take care of this matter and then we can advise you as to how we will proceed thereafter.

PRES: You will want us to return before we are advised?

LO: No, sir. I think, depending on which way this matter is decided will guide you whether or not you will need to return immediately or whether or not you can be excused for a certain period of time.

PRES: All right.

LO: I'll try to make it as brief as possible.

The members of the court withdrew from the courtroom at 0933, 6 September 1961.

LO: Let the record show that the hour is now 0933, this 6th day of September 1961 in an out-of-court hearing of the United States against Augenblick. Present are the accused, his counsel, the reporter and the law officer.

TC: And counsel for the prosecution.

LO: And counsel for the prosecution, I'm sorry.

LO: Before I begin, I want to ask the defense once again to specify exactly their request.

IDC: We have a request, sir, that the government produce a tape recording or recordings which were made at the initial interview of Airman Hodges during which there was present Hodges and an Agent of the Office of Special [74] Investigation of the Air Force, an Agent of the Office of Naval Intelligence of the Navy together with notes which were taken during that initial interview separately by the ONI Agent whose name is Mendelson.

LO: All right, sir.

LO: I have examined the authorities that the defense cited to me yesterday. I've also examined the additional pretrial which I believe counsel indicated yesterday that if these witnesses who appeared in this additional pretrial were called they would testify substantially as they did at the additional pretrial concerning this matter.

IDC: I assume they would. However, depending on the indication that you give in your prospective ruling, it may be that we would request that they be recalled from a matter of demeanor, credibility, appearance on the stand itself, but I suppose for the moment we can say they probably would.

LO: I feel that this matter is strictly an interlocutory matter which would be subject to consideration by the law officer out of the presence of the members of the court. I feel, after reviewing this additional pretrial, that at least there has been in existence a mechanical recording of the initial interview of Hodges, the witness who previously testified. From the nature of the additional inquiry it would appear that this mechanical recording is not now available. However, I do feel that that tape recording, if it is in existence, qualifies as a statement under the Jenks Act and that the Government is required to produce it if available. I feel that it is the duty of the law officer to either call witnesses in this respect or to direct trial counsel to call witnesses in this respect—that the burden does not rest on the defense. I feel that if either of the three people the defense initially requested to stand by were called, I do not believe that they could add anything further to the testimony as to the whereabouts of this tape recording. However, I will now direct the government to inquire of the Office of Naval Intelligence whether or not a search has been made for this missing tape recording and if it is available to produce it. If it is not available [75] then produce a witness or witnesses who can attempt to explain its non-existence. I realize that reference was made to two or three individuals during this additional pretrial, namely a Mr. Fason, Mr. Center and Mr. Lynch. I desire that someone who can speak with authority be produced who can testify as to a search being conducted for this missing evidence and the results of that search.

IDC: May I make one request, sir?

LO: Yes, sir.

IDC: Have you finished?

LO: I'm finished.

IDC: I'm sorry, I didn't mean to interrupt.

TC: I'm not entirely sure that I get the full import of what you told me to do. Do I understand that I'm now being directed to arrange with the ONI that they presently conduct a search for this?

LO: Well, perhaps it would be better stated this way. The government is ordered to produce the tape recordings allegedly made of one Hodges. That is, the initial inter-

view which allegedly took place with ONI Agent Mendelson and from the additional pretrial it's indicated that the OSI Agent was there but did not participate in the interview, but it's the tape recording of this initial interview which a Mr. James indicated in the additional pretrial that he did deliver to the Arlington Headquarters to ONI and subsequently indicated he was not able to produce it. I do not mean to indicate to the government exactly how you will go about this, but I would suggest that the government produce someone in authority who can testify as to making a search for this at least, and then testify as to results of that search.

TC: All right. What's the status of the court members while this goes on?

LO: I would suggest that we simply adjourn an hour out-of-court hearing because we—you are, or when you are prepared to produce the witness or witnesses that you see fit to testify on the subject, it will be an out-of-court hearing.

TC: Right.

LO: And I think the members should be simply ad-
[76] vised that they do not need to remain here at the building—T-34—and that as soon as we are able to proceed, they will be contacted. I think in that way if you're able to accomplish this this morning or if it takes all day, then at least we will have a witness or witnesses called the first thing in the morning on this matter as soon as this is disposed of and the members can be contacted and we will proceed with the trial.

IDC: May I ask one further thing before Commander Hartnett goes about that, and that is, we would like also to have ascertained the status of these records of Mendelson—the ones made in his own handwriting during that initial interview in addition to the tape recordings and to which he refers on page 51 of the additional pretrial proceedings in which he says, and I lift the words from the record, "and what Hodges said". In other words, referring to his memorandum that he took notes that he made sufficient for his own record and as I referred specifically, "and what Hodges said". Did your honor see that?

TC: Down at the bottom of the page.

LO: I see it.

TC: Well, the . . .

LO: The government will not be directed to produce those particular notes at this time and I believe that was the second part of your initial request.

IDC: Yes, sir.

TC: Let me say this. We may be able to resolve this if you're all willing to hear me in a matter which technically ought to be evidence rather than merely an assertion. I talked to Mr. Mendelson yesterday after we left here and he said there are no handwritten notes—he never had any. But he said there is a typed memorandum that he made later on on the 12th of January during working hours, the interview having occurred, as you recall, early in the morning, and I have been able to locate that memorandum. It is not signed; he says he has it in—or typed it in his own hand. And mostly he tells me it has to do with what [77] he did that day—that is to say, I was called at such and such a time, at such and such a time I went to the Gun Factory and so on, but it does, he tells me, summarize, or at least refer to the language that Hodges used or some of the things that he said. I'll get on the witness stand and testify to that if you desire, but I—that is what I'm told the situation is.

IDC: I have come through these procedures to know that Commander Hartnett . . . to know Commander Hartnett quite well, and I take his word without putting him on the witness stand. I'm sure that that is what Mendelson told him, however, our information is contrary wise and has been stated under oath contrary wise and I would call at this time for the testimony of Mendelson as to these—whatever it was, that he produced.

LO: Can you indicate the source of this contrary testimony under oath?

IDC: Yes. In the initial pretrial investigation, Article 32 Investigation, together with what we were asking him on this very thing to which he answered, and from the language that is given here, together with our interpretation of it, undoubtedly then he did make some typed memorandum for his superiors or for himself, I don't

know which, in which he says he used navy terminology, but . . . if you will indulge me for a second. We're trying to find another reference to it here. Yes, just a little further up—about two lines down past the middle of the page, "I did jot down a couple of rough notes at the time." and then further he said, "and what Hodges said". So I can only assume that that—and I think without his testimony on this stand before your honor, what he has asserted to the trial counsel, is all well and good, but he was not under oath when he did it.

LO: Well, I'm basing my ruling primarily on the additional pretrial which I have before me, and also the fact that in order to qualify under the Title 18 of the United States Code, Section 3500 is that this must be a statement, and I feel that the tape recording certainly qualifies in that respect; I do not feel that at this time that that note that the agent may have made in particularly using navy terminology, that it is necessary to proceed further than [78] the tape recordings.

IDC: I don't like to belabor the point and keep in effect rebutting your honor's tentative ruling, but I would like to call your honor's attention to a case which we subsequently found last evening in additional research—that of Papworth, which is in 256 in Section 125, District Court of Appeals decision which was denied by the Supreme Court, and this was the conspiracy to rob a military banking facility. And there the court ruled that the defendant was entitled to relevant portions of the original notebook which FBI Agen recorders used to take verbatim statements made by the witness at the time of the interview with the witness and to an exact typewritten copy thereof. Now, we don't know that there is any type-written copy of this, but I feel that that comes within the statement—the requirement in what Mendelson said, he jotted down rough notes and including what Hodges said, which to me would indicate verbatim statements made by this witness. Also it has just been called to my attention that on page 115 of the court of inquiry, which your honor has not had before now, but I'll be glad to read it to you and show it to you if you like, and this was on my . . . .

TC: What page?

IDC: 115 down at the bottom. This is on my interrogation of Mendelson. "And about how long did that interview take, do you recall? Between 20 and 25 minutes I'd say. And was any statement in writing given during that interview? Not at that time. Did you take any notes? I believe that I did." So that I feel under the case authority, your honor, what has been stated by the agent was what he took. I feel it comes within the same requirement as the recording itself.

LO: Do you have anything further, Commander?

TC: If you will excuse me just a minute, I'll see. No, I think not. Thank you, sir.

LO: The original ruling I made still stands, that is, the government will not be required to produce any rough notes that agent Mendelson allegedly made, however, the government is directed to produce the tape recordings of [79] the initial interview of Hodges, if available, and to call witnesses.

TC: And the alternative would be to produce evidence to show why it is not available, if that is a fact?

LO: That is right, sir.

* * * *

[85] LO: The out of court hearing will come to order. Let the record show that the hour is now 0904, this 7th day of September 1961. Present at the out of court hearing are all parties who were present when the out of court hearing adjourned yesterday morning, with the exception of the reporter who I notice this morning to be Mr. Arena.

I would like to inquire if the trial counsel has available for production to the defense the tape of the initial interview of Hodges as directed by the law officer yesterday?

TC: Trial counsel does not have the tape available for production to the defense.

LO: Is the Government in the position to bring forth witnesses to explain why the Government is unable to produce this tape?

TC: Yes. I have, as directed, required the people both from the Potomac River Naval Command Intelligence Office and the Service Center to make a search of their effects and spaces to determine the possible whereabouts of the tape, and I have brought a group of witnesses here

who can account for, as best that can be accounted for, the absence of the tape.

LO: You may proceed to call your witnesses.

TC: May I ask the law officer precisely how you would like me to go forward? Do you visualize that the trial counsel should examine the witnesses or do you propose to do it yourself?

LO: I would suggest the trial counsel examine the witnesses.

TC: All right. Will you get Mr. James.

The orderly did as directed.

Mr. Louis R. James was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Give your name, residence, and occupation.

[86] A. My name is Louis R. James, J A M E S. My home residence is 1236 South Taylor Street, Arlington, Virginia, and presently a Research Analyst or a Special Agent with the Intelligence Office, Potomac River Naval Command, U. S. Naval Weapons Plant, Washington, D. C.

Q. Now, going back to January 12 of this year, what was your occupation at that time, the same?

A. It was the same, sir.

Q. All right. Now, at some time on that day, was your attention drawn to an incident involving Commander Augenblick? Incidentally, do you know Commander Augenblick? Do you recognize him?

A. Yes, I do. He is sitting at the table to my left at the end.

Q. All right. Now, going back to that day, the early morning of the 12th of January, was some matter concerning Commander Augenblick drawn to your attention?

A. Yes, it was, sir.

Q. And what course of action did you take that day, if any, with respect to Commander Augenblick?

A. On that particular night, which would have been the night of January the 11th, I was the duty agent.

Q. That means what?

A. That means I and another agent were assigned as agents on call at our office. We were on call during the day and the following night, from eight in the morning until eight the following morning.

Q. And if the need for it arose, you would be reached at home?

A. I would be reached at home, right.

Q. Tell us what occurred about Commander Augenblick, under those conditions?

A. I did receive a call from my office from—let's see—the duty yeoman, if there was a yeoman on duty that particular night.

[37] Q. He stayed in the office?

A. That's right. He is in the office the entire time. The duty yeoman called me and said that I was to report to our office, Intelligence Office, Potomac River Naval Command, in respect to a matter of investigation. Usually it is very brief over the phone, just to report to the office.

Q. All right. I assume that you did that?

A. And I did. I reported to the office.

Q. And who did you see when you got to the office?

A. I was the first to arrive. The only one in the office at that time was the duty yeoman.

Q. And ultimately did other people appear?

A. Yes. A short time after I arrived, probably within a matter of ten or fifteen minutes, another agent, special agent of the Office of Naval Intelligence, arrived, William Mendelson.

Q. What time would you say that was?

A. I would say, sir, that it was in the vicinity of approximately three o'clock in the morning, 0300.

Q. Now, as a consequence on his arrival what did you do?

A. Upon his arrival—I might say at this point that Agent Mendelson is attached, or at the time was attached to OP921(D), ONI Headquarters. He was not an agent attached to our office. We more or less came to an understanding at that point upon his arrival that he would assume jurisdiction over the case, inasmuch as over there in his office, ONI Headquarters, would assume jurisdic-

tion, and I would assist him in any way possible I could with the investigation, inasmuch as the person involved in the incident supposedly at that time from my knowledge was attached to Naval Operations, OPNAV, Pentagon.

Q. Now, that was the determination made between you. Now, what did you do as a consequence on that?

[88] A. To my recollection—first, I might precede that by saying that—of course, Agent Mendelson would have had the basic information when he arrived, the same basic information that I possessed, namely, that an officer in the Navy had been apprehended, was presently in the custody of the Armed Forces Police, had been apprehended by the Metropolitan Police on a particular charge. We stayed in our office for just a brief moment or two conferring, and then we proceeded over to the Armed Forces Police Office, which is in the same building, 166. Our office occupies one wing, actually one floor of one of the wings, and the Armed Forces Police is in the other wing of the building. Agent Mendelson and myself then proceeded—

Q. Now, would you clarify that because apparently there has been some doubt about it? To go from your office to the Armed Forces Police, could you stay inside that building, or do you have to go outdoors?

A. No, sir. You do have to exit. You have to exit one of the—from our office to the outside then into the other wing up the building.

Q. And you did this?

A. We did that.

Q. Who did you see when you got into the Armed Forces Police?

A. We went immediately to the—I guess you would call it the main desk or the charge desk, which I believe is located in the basement of the Armed Forces Police Building, and there we met Agent Connor. Agent Connor, I believe, to the best of my knowledge, had arrived prior to myself and Agent Mendelson.

Q. Who is he?

A. Agent Connor is a special agent attached to the Office of Special Investigation, OSI, Air Force, U. S. Air Force.

Q. All right. Saw him and who else?

[89] A. In the office, I believe there were, of course, the desk sergeant—there would have been a sergeant, an Armed Forces Police sergeant on duty at the desk, and also the sergeant who was in charge of the custody of the two individuals.

Q. The two individuals, were they there?

A. They were also there to my knowledge. I can't recall they were actually in the main room where the charge desk was located, but they were in the Armed Forces Police Building, both of them.

Q. And did you ultimately see them?

A. We ultimately saw them.

Q. And who were they?

A. In this case, Commander Augenblick, whom I've previously pointed out, and also an airman in the U. S. Air Force, last name Hodges.

Q. All right. What was the course of conduct from then on?

A. At that point there was just a matter of administration, I guess, you would call it, of turning over the two individuals whom I've previously mentioned to our custody, to the custody of ONI or to PRNC, however you wish to term it. Turned over from the custody of the Armed Forces Police to our office.

Q. All right. Then what?

A. Then, once the custody had changed hands, we proceeded, the three agents, Mr. Mendelson, Mr. Connor, and myself, with Hodges and the Commander. We returned to our office, and I'm fairly certain that one of the sergeants, Armed Forces Police Sergeant would have returned to our office with us, and then the custody, the chain of custody stopped, and he would have immediately returned to his office when we informed him we needed him no longer.

Q. Now, did any interrogation of either of these people you mention take place that morning?

[90] A. After we had arrived back at the Armed Forces Police?

Q. Yes?

A. Yes.

Q. All right. Were both of them interrogated?

A. Both were interrogated, yes, sir.

Q. Who was interrogated first?

A. The Airman Hodges was questioned.

Q. Now, what part in this interrogation did you play, if any?

A. I actually did not play any part whatsoever in the questioning or in the interrogation or in the interview. My only functon in this particular case I—that being my office, I was sort of, you might say, host, and I, of course, made the facilities available for the interviews to Agent Connor and Agent Mendelson. And during the interviews, I located, particular myself in the sound room, sound equipment room.

Q. All right. Was a recording of Hodges interview made?

A. Yes, sir. According to my knowledge, my records.

Q. What part did you play in the recording of this interview or interrogation, whatever you call it?

A. In the recording, sir, my job was strictly to operate the technical apparatus or the recording machine.

Q. And that you did?

A. And that I did, yes, sir.

Q. And can you tell us how long this interview lasted?

A. Which interview are you referring to?

Q. This one with Hodges?

A. To my recollection, my notes, the interview lasted approximately twenty-five minutes.

[91] Q. And then what did you do?

A. Upon the ending, closing of this interview, Hodges left our office with Special Agent Connor of OSI. He at that time was actually in the custody of Agent Connor and then Agent Connor informed us that he would be returning to his office.

Q. In any event, he disappeared with Connor.

A. That is correct, sir.

Q. And no further interrogation of Hodges took place in your office, as far as you know?

A. Right, sir, that is correct.

Q. And did you ever see Hodges back there again?

A. I did not, sir, no.

Q. Now, what did you do with the tape which you had taken?

A. The tapes which would have been in my possession at that time, since I had actually did the recording, the tapes were—

Q. Now, let's not talk about tapes. I'm referring initially to the tape made as a result of Hodges interview?

A. It would have remained in the sound room at that time after completion of the interview.

Q. All right. What I'm trying to get at—I don't want to lead this witness. I may be able to expedite. Tell me if you find it objectionable. What I'm trying to get at, if you, let us say you were then going to proceed—or the other agents were going to proceed, Mr. Mendelson was going to proceed to interview Commander Augenblick, what would you do with the Hodges tape. In other words, would you take it off the machine and put another one on?

A. Right, sir. At that time I would have taken that first tape from the machine and prepared for any subsequent recording.

Q. All right. Now, tell us what you did thereafter with that tape of the Hodges interview?

[92] A. It remained in the sound room or in my direct possession, either in the sound room or in my desk until I left the office later that day. It was not turned over by me—

Q. Was it out of the machine?

A. Right, sir.

Q. But in your custody?

A. In my custody.

Q. Either in the sound room or in your own office?

A. Or in my own office, right.

Q. All right. Now, tell us what you did with it subsequently?

A. Following the interview with Hodges?

Q. Yes? I assume—I understand that an interview ensued with interrogation of Commander Augenblick?

A. That's right.

Q. Let's put that to one side. I'm concerned with the Hodges tape. What further action did you take with respect to it?

A. Further action later that particular day on the 12th I took that tape along with several others to ONI Headquarters at the Navy Service Center to be given to Mr. Mendelson, who was in charge of the case.

Q. All right. Now, did you identify, did you make any identification—In the first place what—you just don't have a tape sort of loose at large? How do you stow them?

A. These tapes are this size approximately (indicating) six inches in diameter, and they are marked on the plastic reel by number.

Q. Right in the center of the tape itself?

A. Yes. At times we do use tapes that may not have a marking on it. However, the tapes that I took, I'm sure had a marking according to my records, a little number. It could be any number, and we used that in our log to record the actual tapes that's being used, and the tape is placed—the reel and the tape on the reel is placed in a tape box, flat square box. A box would hold only one tape.

[93] Q. All right. Now, you say you took it over to the Service Center?

A. At the Navy Service Center, Arlington, Virginia.

Q. Later on the same day?

A. Later on the same day January 12th.

Q. Do you recall what you did with it?

A. Yes. I took it over with the express purpose of giving it to Agent Mendelson, inasmuch as we had parted company subsequently. He had other matters to handle.

Q. Did you give it to Mr. Mendelson?

A. I did not. As I recall, I arrived in his office, and at that time he was involved in some matter in regards to the case. I can't say for sure if he was physically at the Service Center at that particular time, or if he was in conference at the Pentagon. I believe he was still at the Pentagon.

Q. Anyway, you didn't see him?

A. I did not see him.

Q. That day?

A. At that particular time, no, sir. This would have been approximately eleven o'clock, eleven-thirty that morning, late that morning of the 12th.

Q. Now, what did you do with the tape?

A. Of course, Agent Mendelson not being there, I went to his superior, to his supervisor.

Q. And who is he?

A. Theodore Fason, F A S O N.

Q. All right. And you—go ahead, tell us what you did?

A. I went into Mr. Fason's office. I know Mr. Fason. I've worked for him previously in the past, and I inquired of Mr. Fason as to Mr. Mendelson's whereabouts. I think I was under the impression at the time that he was out temporarily. Of course, there was no reason for my staying at that particular point other than to deliver the tapes. Mr. Fason was aware of the events to that point.

[94] Q. Did you say anything to him to indicate what matter was in these tapes?

A. As I recall, yes. I had the tapes with a rubber band around the boxes of tapes with my records there denoting what tape concerned what individual.

Q. All right. How many tapes in all did you have at that time?

A. According to my records, I had three tapes.

Q. One of them would have been Hodges?

A. One would have been Hodges tape, yes, sir.

Q. All right. Now, what precisely did you do with these tapes?

A. I went into Mr. Fason's office, and I believe I was there maybe a period of ten minutes or so, and I did sit down at his desk, besides his desk. And I'm sure I placed the tapes on his desk at that time.

Q. Indicating to him the matter that they were concerned with?

A. Concerned with and these were Mr. Mendelson's to be given to him.

Q. All right. Now, before then, did you put this Hodges tape on a device which would reproduce the voice or voices? In other words, did you run the tape so as to hear it?

A. Oh, I did not, no, sir, at that time.

Q. So far as you know that may not even have recorded? In other words, you never heard the tape?

A. I never heard the tape, right.

Q. All right. Did you ever see the tapes again or that tape, that Hodges tape again?

A. No, sir, I did not. I had no occasion to, sir.

Q. All right. Did you have any further part in the investigation of this case with anyone?

A. No further part, no.

[95] Q. Some time later the question was raised at a pretrial investigation about the whereabouts of the tape, the Hodges tape?

A. Yes, sir.

Q. And you came here, did you not, and testified?

A. Yes, I did.

Q. Before Colonel Peltzer?

A. Peltzer, right, sir.

Q. At that time did you—were you able to locate the tape in the areas and spaces in the Potomac River Naval Command that are available to you?

A. No, sir, I was not able to locate the tape at that time.

Q. Now, yesterday I talked to you on the phone and asked you—I told you that we were still concerned about the whereabouts of that tape?

A. Right, sir.

Q. And I asked you to make a search again of the spaces and facilities available to you to see if you could find it?

A. I did, sir.

Q. Will you tell the law officer what you did pursuant to that call and what the outcome was?

A. I did again make a search of my office in the event the tape may have, through some channel, arrived back at our office. I searched two areas where tapes possibly would be, both one area containing used tapes and another area containing unused tapes, looking for that particular tape with that particular number.

Q. You had some means of establishing the number of that Hodges tape, is that right?

A. Yes, my records reflect a certain number for that particular tape. I would have looked for that particular number.

Q. Now, what was the result of this search?

[96] A. Negative, sir. I couldn't locate the tape in either one of those areas.

Q. As far as you know, from the time that you put this tape on Mr. Fason's desk, has it ever been in your possession or custody?

A. No, to my knowledge it has not been in my custody or in the custody of our office.

Q. Do you know where the tape is?

A. No, I do not, sir.

Q. Do you know if it is in existence as a record of Hodges interview?

A. That I could not answer. I do not know if it is in existence.

TC: I think that's all.

CROSS-EXAMINATION

Questions by the defense IDC:

Q. Mr. James, in answer to trial counsel's question that you don't know where the tape is and that you don't know if in fact it is in existence, you do know as a matter of fact, however, that the tapes which accompanied that tape, and which were delivered personally by you to Mr. Fason and concerning the interview of Commander Augenblick, are in existence, do you not?

A. That is correct, sir.

Q. And do you also know that they have been played back and were actually recorded so that voices came out in the normal sequence of the interview, do you not?

A. Yes, sir, that is correct.

Q. And they were played personally by you at a previous pretrial hearing?

A. That is correct, yes, sir.

Q. Now, this number that you stated that you can use as a means of identifying the Hodges tape, that is the number, as I understand, that you in a sense arbitrarily select and that corresponds in a log which is kept in your office showing that to be the Hodges tape?

[97] A. That would be correct, sir.

Q. And then there were also another number more or less arbitrarily assigned by you to the two tapes which

were made of Commander Augenblick, and they in turn coincide in your log book in your office, is that correct?

A. That's correct, sir.

Q. Now, would there be any reason, so far as you can ascribe, why those tapes would be returned at any time to your office?

A. Why they would be returned to our office?

Q. Yes, sir?

A. This I might say is the first instance where I had actually turned over tapes to custody of ONI Headquarters, inasmuch as they took over jurisdiction of the case. I think I might have told Mr. Fason, and I would do this in any instance. Of course, the tapes are charged to our office, and we have to buy tapes. We use quite a number of them, and there are times they get a little on the scarce side. I believe I told Mr. Fason upon completion of the use of the tapes, he could return them to our office. Of course, we could reuse them in any further investigation, and he understands that. Of course, if they had not been returned, or if he decided to keep them, that again would have been perfectly all right. But if they had no longer any use for the tapes, we could reuse them.

Q. Now, do you know as a matter of fact that in the case of the Augenblick tapes, they were not returned to your office, were they?

A. No, sir.

Q. They were retained in ONI Headquarters?

A. They were retained in ONI Headquarters.

Q. And it was necessary when you reproduced them here before a supplemental pretrial investigation for you to go to Arlington and physically pick up the tapes and bring them here, is that correct?

A. That is correct.

Q. Now, how is this number affixed to the tapes, or to the box?

[98]. A. That number is on the tape. We have an individual who is in charge, one of our special agents who has the technical equipment, in his charge technical equipment in the office, and I can't say for a fact, but I'm sure when he takes a number of tapes and puts them back in the sound room to be used, some new tapes, he is the

one who usually affixes the number, and I'm sure—I don't know if there is any system that he uses for fixing the number.

Q. In other words, once a tape is initially unwrapped from the manufacturer as it is bought by Navy Supply, and a number is affixed, is that a stencil or some type of indelible numbering that remains with the tape throughout its life?

A. No; usually the number is written on a small piece of white paper, usually in ink and then Scotched taped on to the plastic reel.

Q. Right?.

A. And that would stay with the tape usually throughout—it could possibly come off—but it usually would stay with the tape throughout the life of the tape.

Q. In other words, that's the practice that you intend, that it would stay throughout the life of the tape?

A. Yes, sir.

Q. Now, Commander Harnett asked whether or not you knew, as a matter of fact, that the Hodges tape was recorded so that it could be played back, is it not—and to which you answered you don't know?

A. That's right.

Q. But is it not a fact, Mr. James, that you physically monitored the taking of the tape at that time that the tape was being spun through the interview?

A. Physically monitored, yes, that would be the correct terminology. I monitored the tape.

[99] Q. So that you were able to hear not only the—strike that. So that you were able to know that the tapes presumably were being run, but you could hear through a recording device the fact that the sound was being picked up?

A. That is correct, sir.

Q. Now, the language that you used was that, "I'm sure that I placed the tapes on his desk," meaning Mr. Fason?

A. Right, sir.

Q. You have, of course, been interrogated on this before. I believe you were also told in a subsequent interrogation during the same overall investigation that Mr.

Fason had denied that you placed them on his desk but stated instead that he told you to take them to another agent. Now, since that time and since that information has been given to you, have you had occasion to review in your own mind the course of events of that morning?

A. Yes. I've gone over those events a number of times in my own mind, and to the best of my recollection—of course, this would have not been a matter of record, the actual procedure, where the steps I took in the actual delivering the tape. I delivered them directly to Mr. Fason in the absence of Agent Mendelson who at that time was supposedly going to return to the office momentarily. There was no reason for my remaining, and I left the tapes with Mr. Fason with the understanding that the tapes would be delivered to Mr. Mendelson, or, of course, whatever steps Mr. Fason would see fit to take. But I did not, to the best of my recollection—and I'm fairly certain to my knowledge that I did not deliver them to any other individual or had instructions to deliver them to any other individual.

IDC: I have no further questions, sir.

[100] REDIRECT EXAMINATION

Questions by the prosecution:

Q. Mr. James, if I understand your testimony in response to Mr. Kendrick's question, you said that you thought that you said to Mr. Fason, "When they serve their purpose, send them back." I believe you said something of that general tenor?

A. I'm fairly certain, I did, sir, yes.

Q. The significance of that being, I believe, is that tapes are not always easy to come by?

A. Right, sir.

Q. And if they were available to use again, you would like them?

A. We would like to use them.

Q. But on the other hand, the Potomac River Naval Command Intelligence people would find no fault if the people over at ONI saw fit to keep them?

A. To keep indefinitely.

Q. In other words, all the same Navy?

A. Right, all the same Navy. We would have never called them in.

Q. I'm not certain in response to a question of Mr. Kendrick there was some talk about a return of the tapes to the Potomac River Naval Command, but if I understand your testimony correctly, they were not returned either the Hodges tape or the Augenblick tape were returned to the Potomac River Naval Command?

A. No. The Augenblick tapes were not returned to the Potomac River Naval Command, and to the best of my knowledge, the Hodges tape was never returned.

Q. And you can't find Hodges' tape now?

A. Right, sir.

Q. And then when it became necessary to get Commander Augenblick's tape, you physically went to Arlington and got them and brought them here?

[101] A. And brought them to the pretrial.

Q. Now, this business about the monitoring, the taking of the tape, that means, does it not, that you were present in the room and seeing to it that the wheels are turning?

A. Right, sir.

Q. And as part of that operation you can hear the voices of people who are questioning and the reply? Is there any way in an audio fashion that you could tell whether the tape is in fact recording? In other words, does anything come out of the machine that will indicate, while the recording is going on, that in fact it is recording?

A. No. I guess you would say—I'm not an authority on the technical aspects—but all I can say to my knowledge is once the machine is set into motion, the Magnacorder recording machine, and we push the record button which at that time a red light comes on, and if that red light appears, we have to assume it's recording. And I guess you can say that it is recording.

Q. What you can hear is the actual voice of the interviewer and the witness or whoever it is, picked up by a microphone and reproduced by a speaker?

A. That's right, coming through.

TC: I think that's all.

RECROSS-EXAMINATION

Questions by the defense IDC:

Q. And that same thing that you are hearing is being transmitted into the machine so far as you know?
[102] A. What I'm hearing, right sir, over the microphone or earphone, might be either case, I can hear either the microphone or earphone, is being recorded on the machine.

IDC: No further questions.

LO: Does the Government have any further questions?

TC: No, I have no further questions.

LO: There are two matters I would like clarify from Mr. James.

WITNESS: Yes, sir.

EXAMINATION BY THE COURT

Questions by the law officer:

Q. First of all, early in the cross examination of you by Mr. Kendrick you indicated, I believe, that you had played back the tape at a pretrial hearing?

A. Yes, that's right, sir.

Q. And am I correct, that you played back tapes involving Commander Augenblick, but you had never played back any tape concerning Hodges?

A. That is correct, sir.

Q. Now, the second item is this: You indicate that you searched your office?

A. Right, sir.

Q. I assume that's the ONI Office at the Naval Weapons Plant?

A. At the Naval Weapons Plant, right, sir.

Q. Do I understand that you made a thorough search of the ONI Office at the Naval Weapons Plant?

A. Yes, sir, which would be the two areas and my own personal area, which would be my desk, and then the two storage areas.

Q. Are there other areas over there of ONI spaces besides your own two office spaces?

[103] A. Not to my knowledge, sir. It is possible, and it wouldn't be improbable that the tape could have come back and accidentally gone through some other office or been reused on another investigation, and it was now in the possession of another agent. That is possible, but very, I would say, very unlikely. The tape—I might point this out: The tape could have come back, of couse, to our office, say to be reused in the case if there is no longer any use for it, to be reused, and it would have come into the technical section, you might say, and given over to another special agent, and I might not be aware of it. He may tell me, or he may not tell me.

Q. This matter of reuse, is that a common practice in your office?

A. Yes, sir. We use the tape on an investigation and at the conclusion, it is up to the agent as to how long the tape is to be retained. They are usually retained for quite a period of time until we are certain the investigation has reached its final conclusion and that there would no longer be any need for the tape, and then we put the particular tape or tapes back into circulation. In other words, return them to the sound room so that they can be reused. Of course, when they are placed back on the sound machine and recorded again, a new recording takes place and the old recording would be wiped off, and we continually use the tapes.

Q. Now, you say that you normally keep them until the case has reached a final conclusion?

A. That is correct.

Q. What do you mean by the term "final conclusion?"

A. Well, I guess that is a very indefinite term. In length of time again, I couldn't pinpoint that. We have a storage locker where we may keep them in the storage locker or possibly keep them in our own desk, depending upon the agent's decision, and normally the period of three or four of five months—maybe tapes would be in the storage locker for a period of a year—and if we didn't need tapes they would just remain there.

[104] Q. What I'm really getting at is this: I know at times I believe ONI will place on their file "case closed"?

A. Right, sir.

Q. Now, is that what you're referring to as reaching a final conclusion or do you mean even though you might mark your files "closed" still possible litigation might come forward?

A. Well, to answer that I more or less would have to answer that from my own personal experience. Each agent would have a different—in the first place tapes would only be involved in what we call special investigations in which litigation might follow, a civil trial or a military trial. If the case status in our office is marked "closed" we can fairly well safely assume that there would no longer been any use for that particular tape. However, there are instances where our case might be closed as far as our office is concerned and later on the reviewing authority might decide to reopen the case, and this might be a matter of five or six months later, and then there may be some necessity for the tape. Maybe after a month we've closed a case here, five months later the case has been reopened. So this period of keeping the tape could extend over a longer period of time. I would usually in my case keep the tapes for a longer period than actually —a longer period after we have physically closed the case in our office. But that is, as I say, is fairly indefinite. It's usually up to the discretion of the particular agent working the case. He can more or less judge in most instances whether there will be any further investigation or reopening. He usually can tell at that time, because the requesting authorities are usually made cognizant and oftentimes they will advise us as to the outcome of a case. We can tell at that point how the case stands.

[105] Q. I gather then from your testimony, Mr. James, that as a result of the search that you have made, and you believe that to be a thorough search?

A. I believe so, sir.

Q. That you cannot locate the Hodges tape?

A. Right, sir.

Q. In the ONI Office at the Naval Weapons Plant?

A. In the Intelligence Office, Potomac River Naval Command District Office.

LO: Any further questions by the Government?

REDIRECT EXAMINATION

Questions by the prosecution:

Q. In this business of the final disposition, wiping off of the tape and reusing it for totally other purposes, would it be accurate to say that the practice depends pretty much on the agent who has charge of the tape or who has charge of the matter with which it is concerned? Would that be an accurate statement?

A. Yes, sir. You mean, as to whether or not the tape has reached completion?

Q. That's right, and wiped to use it again?

A. And reused again, yes, sir.

Q. Would it be right to say that there is no firm rule that applies to all agents over there at the PRNC Intelligence Office with respect to this? In other words, you will keep tapes six months, or your will keep them three years, or something like that?

A. No, sir, we do not have any set rules. That's pretty much up to the discretion of the particular agent, unless, of course, we had orders from a higher supervising agent who would tell us to keep them with no questions asked.

[106] Q. Now, one more thing about the identification, this business of numbering, as I understood you put a slip of paper with a number on it which is arbitrarily assigned by another agent, is Scotch taped on the plastic reel and then it is used, and the log will reflect that tapes thus and so 587 is applicable to so and so?

A. Right, sir.

Q. Now, when the thing is wiped and the other use is made of it, does that original number still stay on?

A. Yes, sir, the number will still stay on the tape.

Q. Well, how does your log reflect that it is no longer applicable to the first subject or witness and is applicable to somebody else?

A. You mean that particular tape that's missing?

Q. Yes?

A. Well, I just don't have a record of that tape. I don't have it physically in the office. If it had been returned and we wanted to use it again, I would just put it back in the area that—tapes to be used for new record-

ings. That number would remain on and whatever agent had a need for a tape would again—

Q. Use that number?

A. Use that number and his new recording would appear on it, and he could reflect that on his log. Of course, he would pick the tape. He would take the tape from a number of tapes that he was sure no longer had any use, and he would not hesitate to use that tape, because he assumes that the agent—

Q. In other words, each agent has an individual log of these things. There's no common log for the whole office?

A. Oh, no, sir, no. That's up to the individual agent in a case. He has to be sure that this tape for his particular investigation is recorded according to number and that he maintains his own log, for his own file. Now, there wouldn't be any general central file.

[107] TC: All right. That's all.

IDC: I have no further questions.

The witness was duly warned and withdrew from the courtroom.

LO: Would counsel care for a short recess before we proceed?

TC: Yes, sir.

IDC: Yes, sir.

LO: Why don't we recess untill 1000.

The out of court hearing recessed at 0950, 7 September 1961.

LO: The out of court hearing will come to order. Let the record show that the hour is now 1005, the same date. All persons who were present when the out of court hearing recessed are again present.

You may proceed.

TC: Will you call Mr. Wilson.

The orderly did as directed.

Charles R. Wilson was called as a witness for the prosecution, was sworn, and testified as follows:

DIREGT EXAMINATION

Questions by the prosecution:

Q. Will you give your name, address, and occupation, and in the case of your name, please spell it out so the

reporter can have you full name.

A. My name is Charles Richard Wilson, W I L S O N. My residence address is 300 Capital View, V I E W, Court, McLean, Virginia. I'm employed by the Office of Naval Intelligence of the Office of the Chief of Naval Operations. Our office is located in the Navy Service Center at 8th and South Courthouse Road, Arlington, Virginia.

Q. Now, do you know the accused, Commander Augenblick?

A. No, sir.

Q. As far as you know, you have never seen him?

A. I have never seen him.

Q. You are aware, however, that we are now in the course of conducting a general court-martial of Commander Augenblick?

A. Yes, sir.

[108] Q. Are you aware of allegations with respect to him that were handled by your office?

A. Yes, sir.

Q. Now, will you tell the law officer the, so to speak, command relationship in your section of the Office of Naval Intelligence? In other words, what I want to know is what would you designate your own position to be?

A. My position is Special Assistant to the Head of the Investigations Branch of the Security Division, Office of Naval Intelligence.

Q. And your immediate superior would be who?

A. Commander R. A. Klare, K L A R E, USNR.

Q. Now, looking in the other direction, you are the immediate superior of Mr. Fason?

A. That is correct, sir.

Q. And about earlier this year at least he was the superior of Mr. Mendelson?

A. That is correct.

Q. How would you designate Mr. Fason's section or division or whatever you call it?

A. You wish the numerical—

Q. You might give us that. It won't mean anything to me, but I think it ought to be in the record.

A: All right. For record purposes, we'll start at the top. The Director of Naval Intelligence is OP-92. The Security Division takes up another digit and becomes OP921. The Investigations Branch, which is part of the Security Division, becomes 921(D) as in Delta. Mr. Fason, who is in charge of the Operating Section of our Headquarters Activity, becomes 921 Delta (3), and he is in charge of that section.

Q. Now, are there other sections under you?

A. There are, sir.

[109] Q. And how many?

A. 921(D), (D)(2), (D)(3), which is Mr. Fason, (D)(4), and (D)(5).

Q. All right. Now, so far as the matter of locating—which is our present purpose—locating tapes which are alleged to have been taken as a consequence to this investigation, what other section in your division would have cognizance, which one of them of the ones you enumerated?

IDC: I must object to the form of the question.

TC: I'll withdraw it then. Perhaps I mussed it, and I'll try again. What I'm trying to find out is—perhaps it was pretty leading anyway.

Q. Does one of the other sections in your division have cognizance of custody of items of evidence of various cases?

IDC: I still must object. There hasn't been any testimony to the effect that one has cognizance, let alone any other, which is the form of trial counsel's question.

LO: I will sustain your objection at this time.

TC: Well, I concede; I'm not disputing your ruling. I'm just trying to pursuade defense counsel while technically he's right, I don't see how we can run into any damage or prejudice if I pursue it in this way. It certainly is going to save time.

IDC: Well, I don't intend to suggest to trial counsel, but couldn't we just ask, "Assuming such and such came over there, what would happen?"

Q. There has been indication and testimony that a tape was made of an interview with an airman by the name of Hodges having to do with this matter of Commander

Augenblick, and assuming there was such a tape, what would happen to it if it were brought over from the Potomac River Naval Command, Intelligence Office, to your Headquarters?

A. That tape would ultimately wind up in the custody of OP-921(D)(4).

Q. And that would be who?

[110] A. That would be Mr. Lynch.

Q. All right. Now, do you have any knowledge of your own of the existence of such a tape?

A. I have no direct knowledge of my own, sir.

Q. As far as you know, did you ever see it?

A. I never saw it.

Q. Yesterday I called you on the phone and told you that this matter was in issue and that I wanted you to institute a search to establish whether or not you could locate this tape, is that correct?

A. That is correct, sir.

Q. Now, will you tell the law officer what action you took in pursuance of that request?

A. Yes, sir. After you called, Commander, I called the people who had been concerned with this particular case into the office. I told them that it was highly important that a thorough and diligent search be made of all possible areas and spaces where such a tape might be. For the next two and a half hours, this search was conducted. I can give you the results, although you probably would wish to have that—those directly from the individuals who made it. I can tell you this: That after a two and a half hour diligent search, which included desks, file cabinets, safes, other repositories, we could not find such a tape.

Q. Now, will you tell us the people who were involved and who made the search?

A. Yes, sir. Mr. Fason made the search for the space—for the individuals occupied in his section. This would include the space where Mr. Mendelson used to have his desk. Mr. Lynch and Mr. Glenn made the search for the space in 921(D)(4), and Mr. Carroll made the search in the space allocated to his particular office, 921(D)(1)(G).

Q. And the report to you in any event was that it could not be found?

[111] A. The report to me immediately prior to my telephone call to you yesterday afternoon was completely negative.

TC: I think that's all the questions I have of this witness.

CROSS-EXAMINATION

Questions by the defense IDC:

Q. Mr. Wilson, are you aware that there were also tapes made of an interview of Commander Augenblick?

A. I have been told, sir, that there were tapes. I have never seen them.

Q. Do you know where they are?

A. At the present time?

Q. Yes, sir?

A. So far as I know they are in the custody of Mr. James.

Q. Mr. James?

A. Yes, sir.

Q. That was as a result of his procuring them for transcription at a previous pretrial investigation?

A. That is correct.

Q. Now, where were they prior to the time that he obtained them for that hearing?

A. They were with Mr. Lynch and Mr. Glenn in 921 (D) (4).

Q. And they are the same gentlemen and that is the same section that you mentioned if tapes were delivered to ONI of Hodges, they would ultimately end up?

A. Yes, sir.

Q. Now, would it be logical or usual or procedurally regular for tapes upon initial delivery to ONI to be delivered to Mr. Fason?

A. Yes, in connection with a case which was still operational, since Mr. Fason is the supervising agent for current cases.

[112] Q. And then ultimately as a sort of a repository, they would go to 921(D)(4)?

A. Yes, sir.

Q. Would that be a direct thing or would it go to still other channels from him, who is 921(D)(3) to D(4)?

A. Normally, sir, it would be direct. It could be by one other channel depending upon the type of case involved. It might go through a supervisor handling that type of case.

Q. I don't want to inquire into anything which is classified, but by what type of case would you mean it would go through another channel, if you can tell me?

A. Oh, certainly. We have certain individuals who monitor certain categories of cases. A case involving narcotics, for example, we would want this individual to look at the case. It might just be that the evidence involved would go through his channels too, ultimately winding up with Mr. Lynch.

Q. That wouldn't be true of the subject matter of this particular case though? That would ordinarily go through this other channel?

A. Possibly, yes.

IDC: No further questions.

TC: I have no further questions.

LO: I have no further questions.

The witness was duly warned and withdrew from the courtroom.

TC: Will you call Mr. Fason.

The orderly did as directed.

Theodore Fason was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Now, if you will identify yourself, please, giving your name, residence, and your present occupation.

[113] A. Theodore Fason, F A S O N, 6704 Kenmont Place, Springfield, Virginia, presently employed as Supervising Agent, Office of Naval Intelligence.

Q. And do you—perhaps I'd better tell you this: This is a general court-martial. We are presently engaged in an out of court hearing before the law officer in the case of Commander Augenblick on an interlocutory question. Do you know Commander Augenblick?

A. I have met Commander Augenblick, yes, sir.

Q. Do you see him in the courtroom?

A. The gentleman on my left at the end of the table.

Q. Now, the immediate subject here is the whereabouts of a tape which is alleged to have been recorded of a witness by the name of Hodges, who is an airman in the Air Force, which had something to do with this general court-martial of Commander Augenblick. As a preliminary matter I ask you this: In January of this year, specifically on the 12th of January, were you the immediate superior of Mr. Mendelson?

A. Yes, sir.

Q. For the record also, will you give your code number in the Office of Naval Intelligence?

A. OP-921(D)(3).

Q. Delta (3)?

A. Delta (3).

Q. Thank you. Now, there has been testimony that this tape, along with others concerning the same subject matter, was delivered to you on the 12th of January. Do you have any recollection of that?

A. I have a recollection that tapes or boxes purportedly containing tapes was delivered to me on the morning of, I think it was the 12th of January.

Q. Having to do with the Augenblick case?

A. With the Augenblick case, yes, sir.

[114] Q. And can you tell us who delivered them according to your recollection?

A. Special Agent James from the Intelligence Office, Potomac River Naval Command.

Q. And what disposition did you make of them?

A. To the best of my recollection, I passed the tapes to Mr. Mendelson.

Q. Now, yesterday I made a request of Mr. Wilson, the previous witness, who I understand is your immediate superior, to institute a search for this Hodges' tape, and

he tells me that he gave orders to people who would have cognizance, and you were one of them. Now, can you tell us—was that so?

A. Yes, sir that was so.

Q. Now, can you tell us what action you took towards looking—towards locating that tape?

A. I immediately initiated the search in all the spaces or the space let's say that I have control over. The search, do you want to know what it entailed?

Q. Yes, I think so?

A. All right. A search of all stowage file cabinets within my spaces which consist of approximately fifteen certified places of stowage.

Q. Were they rooms?

A. Fifteen file cabinets, four drawer file cabinets, in addition, two lockers, plus eight or nine desks in the space. Went through those completely.

Q. And what was the result of the search?

A. It was negative insofar as the tapes that we were supposed to be searching for.

Q. Now, did you ever hear this tape played so to speak?

A. Never.

Q. Do you have any knowledge one way or the other as to whether there was a Hodges' tape?

A. None.

[115] Q. And if there was one, do you know now where it is?

A. No.

TC: I think that's all.

IDC: May we have just a moment, please.

LO: Yes.

CROSS-EXAMINATION

Questions by the defense IDC:

Q. Mr. Fason, would you tell us what physically you did by way of giving the tapes to Mr. Mendelson, to the best of your recollection?

A. To the best of my recollection, I physically picked the boxes—I don't remember whether it was two or three boxes—and handed them to Mr. Mendelson with the—now,

this is a presumption—I don't know the exact words I said, but presumably, "Here are the tapes in the case that you are currently working on."

Q. And did you have occasion to discuss it with him any further after you delivered them to him?

A. Not to my knowledge, I don't remember specifically discussing the matter of tapes with him.

Q. Can you recall, Mr. Fason, how many boxes there were?

A. No, I cannot. I know there was more than one, but I don't know whether there were two or three. I don't recollect.

Q. Did he have any occasion to report anything to you with regards specifically to what he had learned on them after you had turned them over to him?

A. Would you repeat your question, sir.

Q. Did he have any occasion to report to you as to what his findings were or his conclusions or anything, but with specific reference to the tapes after that?

A. No, no, sir, not with specific reference to the tapes.

IDC: No further questions.

[116] TC: No further questions from me.

The witness was duly warned and withdrew from the courtroom.

TC: I now ask for a recess so that I may inform the members of the court that they better not come here today, and my feeling is that I will say to them to reconvene at 0930 tomorrow unless otherwised advised.

IDC: I suppose that would be all right.

LO: I think that would be appropriate.

TC: Does that seem practical?

LO: Yes, sir.

TC: All right. May we stand in recess?

LO: How long would you like to recess for?

TC: I really don't know.

LO: Let's put it this way: We'll grant a fifteen minute recess, and if you finish beforehand, we'll reconvene, and if it takes longer, that's perfectly all right.

The out of court hearing recessed at 1033, 7 September 1961.

LO: The out of court hearing will come to order. Let the record reflect that the hour is now 1047, this same date. All persons who were present when the out of court hearing recessed are again present.

You may proceed.

TC: Before I do, may I ask permission to be interrupted if Captain Floyd should call.

LO: Yes, you certainly may.

TC: I'll go and get the next witness and give them instructions out there to come in in that event.

LO: I think for purposes of the record in the event the reviewing individual is concerned that at the recess trial counsel attempted to contact members of the court. Captain Floyd is one of the members trial counsel indicated to me that he might expect a call. He has now on the record indicated his request to be excused temporarily in the event that call comes through.

You may proceed.

[117] John W. Lynch was called as witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Now, will you identify yourself, please, giving your name, residence address, and place of business and occupation.

A. My name is John W. Lynch, 1020 Catherine Road, Silver Spring, Maryland, I'm an investigator with the Office of Naval Intelligence, GS-14, Navy Department.

Q. And your office?

A. Navy Service Center.

Q. It's in the Service Center out there at Arlington?

A. Yes, sir.

Q. Now, would you give the law officer your code number in the Office of Naval Intelligence.

A. OP-921(D)(4).

Q. Delta (4)?

A. Delta (4).

Q. Do you know Commander Augenblick?

A. No, I don't.

Q. We are conducting here an interlocutory hearing as part of a general court-martial proceeding against Commander Augenblick, and the immediate question before this interlocutory proceeding is the whereabouts of a tape which is alleged to have been recorded of an interview with an airman from the Air Force called Hodges, which is supposed to have been taken on 12 January, and has to do with this trial. Now, Mr. Wilson has indicated—Mr. Wilson is your immediate superior?

A. Yes, sir.

Q. He has testified here and he has indicated that he—

[118] IDC: I feel I must object to what someone else has testified to. Can't we have a direct question?

TC: I'm sorry.

Q. All right. Did you conduct a search of the spaces assigned to you yesterday as a result of some action taken by Mr. Wilson?

A. Yes, I did.

Q. Will you tell the law officer what you did?

A. I personally requested some of my subordinates to check the tapes that we have on storage there. They did, and I verified the check. I specifically was looking for anything with the name Augenblick or Hodges on it or the number 129, and I found nothing to correspond with this. I in fact checked every tape that we had on storage and verified the names on all of them, and none of them corresponded to these which we were looking for. Then, I further searched all the dead tapes, that is, tapes that had been wiped, because on them they still had the names of the cases that they related to, but this search also met with negative results. So, I had searched and personally searched and looked at every roll of tape that we presently have in the office.

Q. Did you ever see the Hodges tape, assuming there was one, so far as you know?

A. Not to my knowledge.

Q. And did you ever hear it run so whatever voices may have been on it could be heard?

A. No, sir, I did not.

Q. Do you know whether the Hodges' tape so called is in fact in existence?

A. Of my own personal knowledge?
Q. Yes?
A. No.
[119] Q. And if it is in existence, you don't know where it is?
A. That is correct, I don't know.
Q. Who were the subordinates in your division or section that also were engaged in this search?
A. Mr. William A. Glenn, who is presently available here.
Q. Mr. Glenn?
A. Glenn.
Q. I see. Now, he is a subordinate of yours?
A. Yes, sir.
Q. What relationship does Mr. Carroll have to do with your shop?
A. He is also a subordinate in a sense that he is in another unit, the unit being in my section.
Q. I see. Now, did he engage in this at all?
A. Not—Oh, yes, he did. He engaged in the search of his spaces. If I may explain, the difference is that his search was largely negative. We didn't expect that there would be any tapes in his place and there wasn't.
Q. Notwithstanding, he searched anyway?
A. He did search all the files and so forth, but Glenn actually searched tapes.
TC: I think that's all.

CROSS-EXAMINATION

Questions by the defense IDC:

Q. Mr. Lynch, are you aware of tapes involving recording of an interview of Commander Augenblick?
A. Yes, sir.
Q. And did you at some time or do you now have custody of these tapes?
A. I don't have them now, but they were in custody in my office up until the time of the pretrial hearing in this case.
[120] Q. And it was at that time that Agent James of FBNC came to your office and obtained those tapes and

brought them to the pretrial hearing, is that correct?

A. Yes, sir.

Q. And how did you obtain possession of them?

A. I never personally obtained possession. Mr. Glenn in my office received them from Mr. Carroll and kept custody of them. At the time that they wanted them for the pretrial hearing, I was aware of the transaction taking place, because they were playing the tapes, specifically to see if they could identify the voice of Hodges on them, and this was in an adjacent office to mine. I heard the tapes being played and actually saw some of the tapes. That was the extent of my relationship to the transaction.

Q. If I understand you correctly, Mr. Glenn got the Augenblick tape from Mr. Carroll?

A. That's right.

Q. And Mr. Carroll had physical custody of them, I assume, or in his immediate section?

A. For a matter of an hour perhaps.

Q. Well, where had they been before that?

A. Mr. Mendelson, the investigating agent.

Q. And do I understand then that your testimony is that Mr. Mendelson delivered the Augenblick tapes to Mr. Carroll?

A. That's right.

Q. And was that coincident with the time that these were played in the adjoining office and you heard, or was that some time prior to that?

A. Some time prior to that. If I could explain the transaction as I understand it, although here I had no independent knowledge except what people have told me.

Q. Well, from what you know?

[121] A. Mr. James made the tapes. He brought them to our office and turned them over to Mr. Mendelson, who is the investigating agent on the case. This was in January.

Q. Excuse me one second. By your office, you mean Office of Naval Intelligence?

A. Office of Naval Intelligence, not my immediate section.

Q. Right?

A. And Mr. Mendelson kept them from January when this occurred until about June, at which time Mr. Mendelson was being transferred to Norfolk. So, he got rid of everything that he had in his possession, and he took these tapes down to Carroll. This is in the unit that handles case of this nature, criminal, sex, type cases. He took them down and handed them to him. Carroll was not the proper repository for them. He knew this. So, he brought them immediately up to my office where we keep evidence.

Q. And by your office, you mean your specific personal office?

A. Yes, 921(D)(4), and there he turned it over to Mr. Glenn, and remained in Mr. Glenn's custody until Mr. James wanted it for the trial, at which time Mr. James got it from Mr. Mendelson and gave him a signature for it.

IDC: Would you read the last answer, please.

The reporter read the last answer.

WITNESS: If I may correct that. He wanted it for the pretrial, not the trial.

Q. Now, is Mr. Carroll here today, sir?

A. Yes, sir.

Q. And is Mr. Glenn?

A. Yes, sir.

IDC: I have no further questions.

TC: Any questions from the law officer?

LO: I have no questions. The Government has no questions?

[122] TC: I have no further questions.

The witness was duly warned and withdrew from the courtroom.

TC: I will now call Mr. Carroll.

Wendell J. Carroll was called as witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Now, will you please identify yourself, giving your name, your residence address, occupation, and place of business.

A. My name is Wendell J. Carroll. My home address is 5508 Hinton Street.

Q. How do you spell Hinton?

A. H I N T O N, at Springfield, Virginia.

Q. Carroll is spelled C A R O L?

A. Two L's. My position is Personnel Security Specialist, my place of business is with the Office of Naval Intelligence, Navy Service Center, Arlington, Virginia.

Q. All right. Now, Mr. Carroll—first, do you know Commander Augenblick?

A. No, sir, I do not.

Q. I'll tell you that this is an out of court hearing on a collateral question in connection with the court-martial proceeding against Commander Augenblick, and this is the law officer who is conducting the hearing. Now, the previous witness, Mr. Lynch, is your immediate superior, is that correct?

A. Technically he is not my immediate superior. He is the Head of the section of which I'm employed.

Q. But your immediate superior would be whom then?

A. My immediate superior would Mr. Scinta.

Q. And Mr. Scinta I understand is on—.

A. He is on vacation presently.

Q. How do you spell Scinta?

A. S C I N T A.

[123] Q. Now, are you aware of—strike that. Did you conduct a search of your spaces, a search of a tape recording of an interview with a witness Hodges having to do with this case, did you do that yesterday?

A. I did yesterday.

Q. That was at the direction of Mr. Wilson?

A. Mr. Wilson.

Q. And will you tell the law officer just what you did and what the result was?

A. In the office that I work in, there are approximately —well, there are forty-eight file cabinets of which my assistant, who is a first class yeoman in the Navy, and myself, conducted a thorough search of any cabinets whatsoever that would possibly have had any tapes of any sort stowed therein, which resulted in negative results.

Q. Now, is your office—are these spaces that you refer to and these file cabinets, are they the normal place for storage of tapes of this sort?

A. No, sir.

Q. In other words, the function of your office is not to furnish stowage for evidence?

A. No, sir, it does not. The only storage that we maintain there are case histories of Naval Intelligence investigations in certain categories of cases.

Q. But at one time you did have in your possession, although briefly, some tapes having to do with this case, is that correct?

A. I did, sir.

Q. And you received them from whom?

A. Mr. Mendelson.

Q. And what did you do with them?

A. I had them in my custody for approximately three hours of which at that time I physically delivered them to Mr. Glenn, who at that time had the stowage of all tapes within Headquarters of ONI.

[124] Q. Can you tell us whether at that time there was any tape of Hodges interview?

A. I could not say that.

Q. Do you know of your own knowledge whether there ever was such a tape?

A. I do not.

Q. If there was, do you now know where it is?

A. I do not.

Q. And did you ever hear a tape of the interview with Hodges run on a machine?

A. No, sir.

TC: I think that's all.

CROSS-EXAMINATION

Questions by the defense IDC:

Q. Mr. Carroll, you say that Mr. Mendelson delivered to you some tapes, is that right?

A. Yes, sir.

Q. When was that approximately?

A. 3 July.

Q. 3 July?

A. Yes, sir.

Q. Are you able to identify that date by virtue of some record that you made?

A. By circumstances only. At that time Mr. Mendelson was in the process of being transferred from Washington to Norfolk, Virginia, and in the process of his checking out and clearing up his matters at the time and the fact that our office had interest, he delivered the tapes to me and stated that they were the tapes of Commander Augenblick's investigation or—correction, in the interrogation.

Q. Do you recall what he physically delivered to you?

A. He delivered to me four boxes of which I did not open at the time other than label it "Augenblick" and put a rubber band around them just to keep them there on my desk.

[125] Q. Four boxes?

A. Four boxes.

Q. And do you recall did you label only one box or—

A. I labeled no boxes. I used a piece of tablet paper and wrote the name "Augenblick" and put it on top of the four boxes underneath the rubber band.

Q. And it was that bundle that you delivered to Mr. Glenn?

A. That is correct.

Q. Do you recall when you delivered it to Mr. Glenn?

A. That same day.

Q. That same day?

A. Mr. Mendelson gave them to me that morning and I had them approximately two to three hours, and I was at my desk the whole time, and at that time then I delivered them up one floor higher to Mr. Glenn.

Q. And can you state positively at this time that the bundle that you subsequently delivered to Mr. Glenn was the same bundle that you had received wrapped, rubber banded, and marked?

A. I did not quite understand that.

Q. Was the same bundle that you later delivered to Mr. Glenn, the same bundle that you had received from Mr. Mendelson and put this sheet of tablet paper around, rubber banded, and marked?

A. That was the same bundle.

IDC: I believe that's all, sir.

TC: Any questions from the law officer?

The witness was duly warned and withdrew from the courtroom.

TC: I will now call Mr. Glenn.

[126] William A. Glenn, II, was called as a witness for the prosecution, was sworn, and testified as follows:

Questions by the prosecution:

Q. Will you identify yourself, giving your name, residence address, occupation, and place of employment.

A. My name is William A. Glenn, II.

Q. How do you spell Glenn?

A. G L E N N. My residence address is 606 Potomac View Avenue, Woodridge, Virginia, and I'm employed by the Office of Naval Intelligence as a special agent at the Navy Service Center in Arlington, Virginia.

Q. Do you know Commander Augenblick?

A. No, sir, I don't.

Q. We are conducting here an out of court hearing on an interlocutory matter in connection with the court-martial of Commander Augenblick, and the particular subject is the whereabouts of a tape which is alleged to have been made of a certain witness, Hodges, which has to do with this case. Now, yesterday at the direction of someone of your superiors out there at the Service Center, did you conduct a search for such a tape?

A. No, sir, I did not. The man that has custody of the cabinets in which our tapes are normally stored did, I understand.

Q. And who would that be?

A. Mr. John R. Morgan.

Q. And what is his capacity?

A. His capacity is that of electronic technician.

Q. You mean he is an enlisted man?

A. No, he is a civilian.

Q. But an employee of the Office of Naval Intelligence?

[127] A. Yes, sir.

Q. Well, do you have any knowledge of—well, let me ask you this: What is the function of your office? You are under Mr. Lynch; is that right?

A. Yes, sir. We are under Mr. Lynch as he is Head of the Special Activities Section.

Q. What is the specific function of your office?

A. Well, our office provides technical support in the fields of electronic photography and firearms.

Q. And do you also supply stowage for such items as tapes?

A. Yes, sir.

Q. Would it be accurate to say that tapes which are intended to be preserved but which the special agent or other investigator involved doesn't want to keep in his possession would normally be turned over to you for stowage?

A. Yes, sir. They are turned over normally to Mr. Morgan, and he happened to be on leave, and I happened to have the combination of the safe in which they are stowed. It just happened that the safe was in the office. The Electronic Section normally keeps the tapes, however.

Q. Do you have any knowledge of any tapes having to do with the Augenblick case?

A. Yes, sir, I do.

Q. Would you tell us how that came about?

A. Well, Mr. Carroll came up one day when Mr. Morgan was on leave—I don't recall the exact date, but it was in June, I believe—and asked me if I could stow some tapes for him, and he handed me a package of tapes which had a label on it which said "Augenblick, four tapes." And I put it in the cabinet and locked it up.

[128] Q. Now, can you tell how many tapes there were in that package?

A. I did not count them specifically at the time I received them. However, I took the whole package with the label, put a rubber band around in two directions to hold them all together, and a few days later Mr. Carroll called me up and said, "Do you remember those tapes I gave you on Augenblick," and he said, "How many do you have?" I went and looked in the cabinet. I said, "I have four." He said, "That's right, that's what I gave you."

Q. Do you have any knowledge as to whether there ever was a tape of the interview of the witness, Hodges?

A. No, sir.

Q. If there was one, did you ever hear it played?
A. No, sir.
Q. And if there was one, do you know where it is now?
A. No, sir.
Q. I take it from what you say that your man, Morgan, is he your—are you superior to him?
A. No, sir. He's superior to me.
Q. Superior to you, but I take it that he did not indicate to you that he had found the Hodges tape yesterday?
A. No, sir. I was out of the office yesterday physically on another job.
Q. He had to be the man to make the search?
A. I assume he was. I was not there when the search was going on.
TC: I guess that's all.
LO: I'll consider the last statement of the witness is based on hearsay, that is, that a search was going on during his absence because he doesn't have direct personal knowledge.
You may proceed.

* * * *

[129] LO: Let the record show that the hour is now 1125, the same date. The out of court hearing will come to order. All persons who were present when the out of court hearing recessed are again present.
TC: I have made arrangements for the witness, Morgan, who was referred to by the last witness, to be here at 1315, and he will be here. I have no more testimony available at this time, and I won't have any until he gets here. More than that, the defense has now indicated that they feel that the presence of Mr. Mendelson is required, and I don't—I'll undertake to do what I can. I don't see how I can get him here today. Do you want to be heard on that, Mr. Kendrick?
IDC: Briefly, I would say, Your Honor, that as you know, we have previously requested his presence in connection with an adjunct to the matter about which we are now inquiring, and you had indicated at that time, anyway a ruling against us—but I would like to renew [130] that request at this time, particularly in view of the testimony here today as pertains to the tape, and, of course, once he is here, then Your Honor can again rule on the propriety of the testimony of the others, because I think I would renew my request on the other two.

LO: Well, I notice from the additional pretrial on page 51, Mr. Mendelson was being questioned, and he stated that he was not certain that he had any recording of the Hodges interview.

IDC: Is that 51, sir?

LO: I believe it's 51 of the additional pretrial.

IDC: Oh, I thought you said the initial.

LO: Colonel Peltzer's investigation. That is at the bottom of page 53 and at the top of page 54 when Mr. Mendelson was asked concerning the recorded testimony of Hodges at the next interview. The question was, "Don't you recall of your own independent recollection?" And he says, "I honestly don't." And again on page 54 the question was asked, "But you have no independent recollection of whether one was done with regard to Hodges?" And the answer is, "No, I do not." Then on page 58, individual defense counsel, "Mr. Mendelson, as a result of what investigation you have been able to make, can you state at this time whether or not there was a record made of the interrogation of Airman Hodges?" And his answer, "No, I cannot—the word is 'stated'—whether or not there was a record made of the interview of Airman Hodges."

I would like to inquire at this time if the defense has any reason to believe that this witness would change his testimony in any respect with regard to the answers he previously gave under oath as to his knowledge of any records made of this initial interview?

IDC: Your question is whether I have any idea that he would change his testimony from what he testified earlier?

[131] LO: That's right.

IDC: I frankly don't know, sir. We had one very glaring change here this morning to which I will refer later. I just don't know.

LO: I might admit that this is a difficult decision for me because I don't want to hamper the defense in any way on this issue, and yet I do not want to call a witness needlessly if he can add nothing to his previous testimony. I frankly would like to think about it for a little bit. If I decide that your request will be granted, and the previous indication is that Mr. Mendelson is in Norfolk. He

couldn't get here today anyhow, I don't believe. Suppose we recess for the noon hour until 1315, and the first order of business at that time will be the ruling on the request.

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[134] DIRECT EXAMINATION

Questions by the prosecution:

Q. Will you identify yourself to the law officer by name, residential address, occupation and place of business?

A. My name is Henry V. Schultz . . .

Q. Spell Schultz for the reporter.

A. S-C-H-U-L-T-Z. I live at 600 Park Avenue, Laurel, Maryland; I'm a GS-13 Investigator with the Office of Naval Intelligence at the Navy Service Center, Courthouse Road,—South Courthouse Road, Arlington, Virginia.

Q. That in . . .

A. Arlington, Viriginia, yes.

[135] Q. Now, do you know Commander Augenblick?

A. No, sir.

Q. Mr. Schultz, this is an out-of-court hearing being conducted by the law officer in the court-martial proceedings against Commander Augenblick and the subject is an effort to locate a tape which is alleged to have been made of an interview with the witness Hodges who is concerned in this matter. At my request Mr.—or did you conduct a search for such a tape yesterday?

A. Yes, I did, sir.

Q. And what areas . . . you're subordinate to Mr. Lynch, is that correct?

A. That's right.

Q. And he directed you to conduct such a search?

A. Yes.

Q. Now, what particular areas are within your cognizance would you say over at the Service Center in Arlington?

A. Mr. Lynch, of course, is the superior for the section and we handle all investigations—criminal investigations and training as well as the technical aids—it's part of our business, and my particular job is to control the criminal investigations and assist him in the trainng of new

agents. Yesterday Mr. Lynch received a telephone call and in the absence of Mr. Morgan and Mr. Glenn who are actually assigned to the technical aids unit of our section, asked me to open up the safe and search for the tape.

Q. All right. Tell us what you did in the areas that you covered.

A. The particular area that I covered is a safe-type cabinet, four drawers, combination lock, of course, on it, and I opened the safe with the assistance of my yeoman and then I conducted—or looked through the four drawers for this particular tape that you were looking for and of course, three names, the number 129, was given me—the name of Hodges and the name of Augenblick.

Q. Hodges. Now, will you tell us the result of your search?

A. I didn't find the tape, sir.

Q. Prior to yesterday were you aware of any tapes [136] involving the Augenblick case?

A. No, sir.

Q. You were not. At any time did you see the Hodges tape?

A. No, sir.

Q. Do you know whether in fact any such tape exists?

A. No, sir.

Q. To your knowledge?

A. No, sir.

Q. That means, of course, that you never heard it played in any such manner where the voice would appear?

A. No, sir.

Q. If there is a tape which recorded an interview with Hodges, do you know where it is?

A. No, sir.

Q. Would you say that you had exhausted the resources of that particular office of yours for any place where that tape might be?

A. Yes, sir.

TC: I have no further questions.

CROSS-EXAMINATION

Questions by the IDC:

Q. What was the number 125 supposed to identify, Mr. Schultz?

A. 129.

Q. Yes, sir.

A. You said 125. I don't know, sir. Some of the tapes contain a number that is placed on them and possibly that had some significance, but I don't know.

Q. Do you recall by whom you were requested to make a search?

A. Mr. Lynch.

Q. And was it he who gave you the number 129?

A. Yes.

[137] Q. And did he tell you what 129 was supposed to identify or refer to or. . ?

A. No.

Q. Just, I want you to look for a tape number 129?

A. 129 on Hodges together with Augenblick.

Q. Did he indicate to you where he had gotten the number 129?

A. No, sir, but he had been on the phone and as soon as he hung up he checked first to see if Mr. Morgan or Mr. Glenn were around. I sit right next to Mr. Lynch and he asked me to conduct the search because the combination is held within a very limited number of people.

Q. Then I understand that Messrs. Lynch, Morgan, Carol and yourself are all in the same room?

A. No. Glenn, I believe.

Q. Glenn.

A. Carol is on the floor below and in a different section.

Q. But outside of Carol the other four of you are in the same room?

A. Yes.

IDC: No further questions.

TC: I have no further questions.

LO: Any objection to excusing this witness?

IDC: No, sir.

The witness was warned, excused and withdrew from the courtroom.

TC: That's the extent of the testimony that I have available today.

LO: Has the defense—does the defense desire a ruling on his previous request?

IDC: Whatever is the pleasure of the law officer.

LO: As I understand, defense has specifically requested that Agent Mendelson, who I also understand to be physically located down in Norfolk, Virginia, be called as a witness for the defense. Am I correct?

IDC: No, sir. I hadn't requested that he be called as a witness for the defense. I feel that this is essentially [138] a matter of evidence piecing together the picture by the government in response to our motion.

LO: I will amend that statement to indicate that you feel that this Agent Mendelson should be called before this issue is decided by me.

IDC: Yes, sir.

LO: Not as a witness for the defense but in all fairness and justice?

IDC: (shakes head yes).

LO: I did not mean to indicate, and do not indicate that I feel that the burden is on the defense in any respect in this matter. I feel that it is upon the government to produce or explain why it doesn't produce. I would like to inquire before I make a ruling if the defense has anything to offer or any argument to make or desires to proceed further in any way before I make a ruling.

IDC: This is purely as to the production of Mendelson?

LO: That's right.

IDC: No, sir.

LO: I feel that under the circumstances that I have no showing that any new additional or different evidence would come forward from Mr. Mendelson other than as reflected in what I would term the Peltzer Investigation. But in view of everything that I have heard, at this time I will not grant the government to produce Mr. Mendelson from Norfolk.

* * * *

[146] * * * We don't know what took place on those tapes and that's the very basis of the Jenks Act—that we be permitted to use prior statements to determine whether there are inconsistencies with what we now heard on direct testimony from the witness. Another point that Commander Hartnett brought out was that willfulness is not chargeable to the government for the destruction or whatever happened for the existence of it, but I submit very respectfully that the court—that the government has brought these charges. The government is attempting to prosecute a general court-martial against an officer of the service and the willfulness is upon the government to comply with the laws, regulations, rules, procedures—everything that is involved in criminal prosecution and this is a part of it. The fact that no one has ever heard the tape, the fact that no one else other than James is even aware of the existance of the tape, I submit to the court is irrelevant. I don't know whether trial counsel is seeking to impeach his own witness, the Agent James, when he says no one else but James is aware of the existance of that tape, but nonetheless the government produced the tape. The agent says unequivocally, I was there; I mechanically assisted in the production of the tape and I thereafter delivered it to my superiors at ONI Headquarters, and I think that must be accepted without impeachment. The fact so far as he knows, there was such a tape made and that it was delivered in the ordinary course of business to his superiors. So, on those points I move for a dismissal of the charge and specification.

LO: Anything further by the government?

TC: No, I'll rest on what I said.

LO: Well, I might say, gentlemen, that I don't feel the government can produce something that is not available. Of course the issue is—does it have it or does it not. I do not find from the evidence which has been considered in this out-of-court hearing any indication of any attempt to supress this particular evidence. The government has satisfied me, at least, that reasonable effort has [147] been made to locate this tape; the results have been negative. The motion of the defense to strike the testimony of Hodges is not granted. The motion to dismiss

the charge and specification against Hodges is not granted —I mean Commander Augenblick is not granted. In view of my ruling I believe the next order of business would be to recall Hodges to the stand and proceed with cross-examination.

* * * *

[148] The court opened at 0933, 8 September 1961.

* * * *

CROSS-EXAMINATION

Questions by the IDC:

Q. Hodges, directing your attention to the day of the 11th of January 1961, do you have that day in mind?
A. Yes, sir.
Q. What were you doing earlier in the day?
A. I was dating my fiance.
Q. Sir.
A. I was dating my fiance.
Q. When did you meet your fiance?
A. Some time in the afternoon.
Q. Can you give us an approximate time?
A. I imagine about 4 o'clock, I don't know.
Q. And what did you do after you met her?
A. I picked her up and went down to the Angus Restaurant and had dinner and went to a concert—the Marine Band.
Q. And that was some where in the downtown area of Washington?
A. Yes, sir.
[149] Q. And where had you picked her up?
A. At the Washington Hospital Center.
Q. What was her status there?
A. She's a student nurse.
Q. So that you picked her up at approximately 4 o'clock, took her to dinner, then went to a concert of one of the service bands, is that right?
A. Yes, sir.
Q. And do you recall approximately when that concert ended?
A. We didn't stay for the end, sir.
Q. Do you recall approximately when you left?

A. I think around 10 o'clock.

Q. Around 10, and where did you go from there?

A. I took her back to the Hospital Center.

Q. By cab or streetcar?

A. By cab.

Q. By cab. And after you arrived at the hospital center, what occurred thereafter?

A. I said good night and then went back down town and caught my bus—I went downtown and went to the bus stop and waited for my bus to Andrews.

Q. Now, was there any period of time from the time that you picked her up—you testified approximately 4 o'clock—to the time that you said good night to her, that the two of you were alone?

A. No, sir.

Q. You mentioned her as your fiance. Is it your hope to marry her?

A. Yes, it is.

Q. When do you plan to marry her?

A. I was planning on September 18th. We had to move the date up on account of the extension of this.

Q. In other words, as soon as you are released from your status as a witness you plan to marry her, is that right?

[150] A. I do.

Q. Now, coming to the period of time that you had testified that you parked in this car somewhere in an area in which you have described, what type of headgear were you wearing?

A. My garrison cap. It's a broad hat with a bill.

Q. And when you were in the car, what if anything did you do with that cap?

A. I put it on the dash.

Q. That was the dash immediately in front of you?

A. Yes.

Q. And did it remain there during the entire time up until the time that you had testified the police came up to the car?

A. Yes, sir.

Q. Do you recall when you got out of the car whether or not you took your cap with you or did you leave it there on the dash?

A. I can't recall, sir.

Q. Now, at the time the police came up to the car and asked you and Commander Augenblick to get out of the car, was any statement made to you at that time as to why you were being asked to get out of the car or what was you status?

A. You mean from the police officers?

Q. Yes.

A. No.

Q. In other words, you were simply asked to get out of the car, and as I believe you testified the other day, present your identification?

A. Yes, sir.

Q. Now, when you arrived—you testified the Third Precinct?

A. I think so, sir.

Q. When you arrived at the Third Precinct, were you informed at that time that you were under arrest or what?

A. I can't recall, sir.

[151] Q. You have no recollection of a specific charge being made?

A. No, sir.

Q. Now, when the Armed Forces Police arrived at the Third Precinct and took you in custody, how did you go from there to the Armed Services Police Headquarters?

A. I drove with the OSI Agent.

Q. The OSI Agent?

A. Yes. From the . . . where, from the Armed Forces Police Building to . . .

Q. Now, we're starting out from the Number Three Precinct, and you went from the Number Three Precinct, I believe you testified, to the Armed Services Police Department Headquarters at the Naval Weapons Plant, is that correct?

A. Yes, sir.

Q. Now, how were you transported from the Civilian Police Station to the Armed Services Police?

A. By Military Police.

Q. And did you ride in their car?

A. Yes, sir.

Q. Do you recall what services were represented by those policemen?

A. One Navy and one Air Force.

Q. Enlisted Men?

A. Yes, sir.

Q. And you rode in their car?

A. Yes, sir.

Q. Where was the Commander?

A. He was in the Cheyy.

Q. In his own car?

A. Yes.

Q. He followed you all to the Armed Services Police, did he?

A. Yes, sir.

[152] Q. Now, subsequent to your interview by the OSI at Suitland, Maryland, I believe I understood you to testify that you were returned to your base, is that right?

A. After Suitland I was.

Q. Returned to your Base—at Andrews Air Force Base?

A. Yes, sir.

Q. By the OSI Agent?

A. Yes, sir.

Q. And to whom were you surrendered or presented?

A. I was turned over to the Acting First Sergeant until the Commander came, and then I was turned over to him.

Q. About what time did the Commander arrive?

A. 8 or 8:30 in the morning.

Q. Who was the Commander?

A. Major Hafer.

Q. Do you know the spelling of Hafer?

A. H-A-F-E-R.

Q. And at the time that Major Hafer arrived, did you have any discussion with him about the difficulties in which you were involved?

A. Prior to the time?

Q. No. Let me rephrase my question. You stated that Major Hafer came in at around 8 or 8:30, I believe, and at that time you were presented to him by your Acting First Sergeant?

A. Yes, sir.

Q. Now, my questions is: At that time when you were presented, did you have a discussion with Major Hafer about the difficulty with which you are involved?

A. Yes, sir.

Q. And, will you tell us at that time, or some time subsequently thereto were you presented with a letter of notification by a Major Hafer?

A. A week or two after that I was.

[153] Q. And in that letter of notification which Major Hafer presented to you, were you advised that he was going to recommend that you be given an honorable discharge from the Air Force?

A. No, sir.

Q. Were you at some subsequent time advised by Major Hafer that he was going to recommend you for an honorable discharge from the Air Force?

A. I don't know what subsequent is.

Q. After.

A. After I was.

Q. You were told that you would be recommended for an honorable discharge from the Air Force?

A. Yes, sir.

Q. Now, I judge that you are still in the Air Force?

A. Yes, sir.

IDC: I have no further questions.

RE-DIRECT EXAMINATION

Questions by the prosecution:

Q. In what form was this notification that you would be recommended for an honorable discharge from the Air Force—I mean, what form did you receive that in?

A. When I was interviewed by Major Hafer after I replied to this letter of notification in his office, he said he was going to recommend me for an honorable.

Q. In other words, he said this orally?

A. Yes, sir.

Q. Can you put a time on that when that occurred—that interview?

A. Approximately about three weeks after the arrest.

Q. That would make it towards the end of January or early February?

A. I think so, sir.

TC: I think I have no further questions.

* * * *

[155] DIRECT EXAMINATION

Questions by the prosecution:

Q. Now, Officer Round, will you identify yourself by giving your name, residence and occupation.

A. Norman Round, 233 Dale Drive in Silver Spring, Maryland. I'm a private on the Metropolitan Police Force assigned to the Third Precinct.

Q. Do you recognize the accused in this case?

A. Yes, I do.

Q. What is his name?

A. Richard G. Augenblick, seated right over here (points).

Q. Now, I call your attention in particular to the morning—the early morning of January 12, 1961. Will you tell the court where you were at that time?

A. Yes, I was working the 12 midnight to 8 A.M. tour of duty in the Third Precinct; I was assigned duties in Scout 32, a routine patrol in the south end of the Precinct.

[156] Q. You say you were assigned duties in Scout 32?

A. Scout 32; that's my regular duty.

Q. That means. . . .

A. That's a radio patrol car.

Q. And was anyone else assigned to that?

A. Yes. Officer George W. Pickeral of the Third Precinct was my partner.

Q. Now, who was driving at that time?

A. As I recall, I was driving.

Q. Now, calling your attention to a time about, oh, around 0100 or somewhere around then, can you tell us where you were?

A. Yes, I was in the vicinity of West Basin Drive; that's the West Side of the Tidal Basin.

Q. Here in Washington?

A. Here in Washington, D. C.

Q. Tell us what occurred at that time?

A. As I recall, we were cruising in the neighborhood of the Tidal Basin; as we came around West Basin Drive —there's a curve there in the roadway, a big round curve —and we observed two vehicles parked on the right side of the roadway; it's a one-way street. They were parked on the right side of the roadway, and we pulled up behind the second vehicle and observed both cars, two people in each car. We could see from the light that there were two people in each car. We observed the car closest to us and as we watched we saw the head of the person seated on the driver's side move over toward the person seated on the passenger side and disappear out of view. We could just see one head in the car then. My partner, Officer George Pickeral got out of the scout car and walked up to the vehicle—went up on the right side, the passenger's side of the vehicle, and looked in. He observed the vehicle for a short period of time and then he came back to the scout car and motioned for me and I, as I recall, I stepped out the door, and he told me to come on up, so I called my radio dispatcher and told him to hold us out of service, and I walked up and went up on the passenger's side of the vehicle and looked in. I looked in [157] through the front right hand door and I could see a figure of a man—a man in an Air Force Uniform—seated in the passenger's side of the vehicle—seated slumped down with his head back against the seat, and the head of the person sitting next to him was down in the man in the uniform's lap. I just observed him for a few seconds; then the head of the man that was down raised up. At that time I saw the man in the Air Force Uniform had his trousers open and his penis was exposed. The man in civilian clothing—the person that was on the left side, the one on the driver's side—he moved over behind the wheel and turned the lights of the vehicle on and made as though he was going to drive away. At that time I ran back of the vehicle and around to the driver's side and opened the door and told him to get out. We asked the two persons in the car for identification. As

I recall, the driver—the one in civilian clothing, that is the defendant, Commander Augenblick—he was dressed in casual clothing—sports clothes, he produced a civilian driver's license and the Airman produced an ID Card and said his name was James Orland Hodges. He said he was stationed at Andrews Air Force Base. The Commander—Augenblick—then produced a service ID Card and said he was in the United States Navy. We told both parties to follow us to the Third Precinct. We held on to their ID Cards, and they both got back in their Chevrolet Sedan and they followed the scout car to the Number Three Precinct which is on 2014 K Street, North West. At that time we charged them in the Red Book with disorderly conduct. The Armed Forces Police were notified and they came to the Precinct and took over the custody of the prisoners.

Q. Now, you made reference to a Chevrolet. Was this car you saw the accused in a Chevrolet?

A. Yes, a Chevrolet and it had California tags on.

Q. Can you remember the number on the tag?

A. If I would be allowed to refresh my memory, I have a copy of the report I made which has the tag number on it. Would you care if I refresh my memory?

[158] Q. Without refreshing your memory, you can't recall it?

A. Not accurately. I have a rough idea what it was.

Q. Well, then, if there is anything you possess that will refresh your memory, you may use it.

A. I have it right here—it was a Chevrolet Sedan with California tags, RWM 407.

Q. Right. Had you ever seen Commander Augenblick before?

A. To the best of my knowledge, no, sir.

Q. Had you ever seen this man, Hodges, before?

A. No, sir.

Q. If you will indulge me for a moment, please, I want to check my notes.

Q. You said that you told the dispatcher—I take it the radio dispatcher—to take you off the air?

A. Yes, hold us out of service.

Q. Can you indicate the time that that occurred?

A. I can estimate, sir, but without consulting my records, I couldn't tell you accurately. I believe it was around

1:12 A.M., but the exact time, without consulting my records. . . .

Q. Would that document that you just referred to—would that refresh your recollection on the time?

A No, sir. My report doesn't show that, but my records in the Station do.

Q. But to the best of your recollection it was around 1:12 or something along that order?

A. Approximately that time, yes, sir.

Q. You may inquire.

CROSS-EXAMINATION

Questions by the IDC:

Q. Officer, you stated that you came up behind the two parked cars?

A. Yes, sir.

Q. And you were able to observe that there were two individuals in each car?

[159] A. Yes, sir.

Q. Can you approximate the distance between the car behind which you stopped and the car ahead of it?

A. I would approximate it around 20 to 30 feet between the two cars; at least 20 or 30 feet.

Q. A little over a car's length away?

A. Yes, sir.

Q. And do you recall what type of car this other car was?

A. It was a Sedan, but the make I can't recall.

Q. Do you recall . . . strike. What observation did you make of the individuals in this other car?

A. It appeared to be a male and a female.

Q. Now, was that appearance to you while you were still seated in your own scout car or after you had gotten out and gone up to this first car that you approached?

A. I don't recall when the observation was first determined, but it's definitely in my mind that it was a female and a male, but when I observed the nature of the sex I couldn't determine at this time.

Q. Did that car remain there while you all were on the scene?

A. Yes, it did.

Q. Throughout the whole time?

A. As far as I recall, it did.

Q. And do you recall was it still there when you directed the two individuals to get back in the car and follow you to the Third Precinct?

A. As far as I recall, it was, sir.

Q. And was there any time that either you or Officer Pickeral went up to this second car?

A. No, sir.

Q. Now, it's your best recollection that you were driving, is that correct?

A. Yes.

[160] Q. And you recall specifically putting your own car out of service?

A. Yes.

Q. And then joining Pickeral at the side of the car that you went up to?

A. Yes, sir.

Q. Now, you mentioned a moment ago in your testimony that the driver of this car raised up as if to drive away. Was the motor started or anything of this sort?

A. I can't recall whether the motor was running when we went up or not. The reason I say moved as if to drive away is that he turned the lights on.

Q. Turned the lights on. ...

A. And whether he cranked the motor or the motor was running—I know that when I opened the door the motor was running, but I don't recall whether he cranked it when he turned the lights on or whether it was already on.

Q. Now, did the motor continue to run during the time that you were interviewing them outside of the car or at least asking them for their identification?

A. To the best of my recollection, I told the man to turn the motor off, but I'm not specific on that.

Q. Try to think back, if you will, Officer Round. Isn't it a fact that the motor was not on at that time; that all that was done was the turning on of lights?

A. To my recollection, the motor was running. I say it's just a recollection; I couldn't be positive. I mean I have no notation of it either way.

Q. There was no movement of the car, was there?

A. No, sir. When I opened the door . . . .

Q. Now, can you recall exactly what you stated . . . strike that. Who addressed the two individuals first?

A. I addressed the Commander and my partner spoke to the passenger—the Airman—Hodges.

Q. And what did you say to the Commander, if you recall?

[161] A. I told him to get out of the car; I asked him for some identification; I told him to follow to the Third Precinct.

Q. In other words, do I understand you correctly that you came up to the car, and at the point where you opened the door you stated, get out of the car and show me your identification?

A. Yes.

Q. And then you said, get back in the car and follow us to the Precinct. Is that right?

A. There was other conversation at the scene, but I can't recall all of it. But I specifically remember telling the Commander to get out of the car, asking him for identification and telling him to follow us to the Precinct. My partner, Officer Pickeral, also had conversation with him which I don't recall the exact words, and I assume I did too, but I can't recall exactly what was stated.

Q. Now, at the time you approached the car, you were on the right hand side or the left?

A. I walked up on the right hand side of the car. The car was against the curb.

Q. And at that point you observed the person whom you later identified as the commander, to be raising up, is that correct?

A. No, when I walked up to the car, his head was down in the Airman's lap. The airman had his head on the back of the seat.

Q. As I understood you to say on your answer on direct examination, that as you approached you observed his head raising up—the individual's head and body raising up?

A. No, sir, as I recall, I said I walked up and looked into the right hand door a few seconds and then his head raised up.

Q. Now, when you got them to the Precinct, first of all, you had them follow you to the Precinct, didn't you?

A. That's correct.

[162] Q. In the car in which they were. You didn't have one go in your car and one in the civilian car?

A. No, sir.

Q. When you got to the Precinct, what was the charge you placed against them?

A. We charged them with disorderly conduct.

Q. And what did you do after you got them into the Precinct itself?

A. As you come into the Precinct there is a counter with an Arrest Book on it, and each of the prisoners are booked in which their names are recorded and information as to place of birth and residence for police records; and then they are allowed to step back into a room which is just behind the counter; it's a small room called the Report Writing Room; and they waited in that room until the Armed Services Police arrived. Now, while they were in that room. . .

Q. While they were in that room, did you, or do you know whether your partner kept them under constant surveillance?

A. They were under surveillance, yes, sir, all the time.

Q. And was that by you or your partner or who?

A. Both of us. I mean there was always a police officer to watch them in there. I mean we didn't hold on to them; they were free to sit down, stand up. We didn't leave them out of our sight.

Q. During the time you had them under surveillance did you notice any conversation between them?

A. I don't recall. There might have been a little conversation, but not too much.

Q. And there wasn't any repeated conversation back and forth during the entire time that they were in that room and under your surveillance?

A. I remember the Commander asking why he was here or some words to that nature. He repeated that several times. I don't recall the nature of any other conversation.

[163] Q. Was that answered by you?

A. I don't recall who answered.

Q. Do you recall whether there was any answer?

A. There was an answer given to them.

Q. Now, what was the condition of the weather on that evening?

A. As far as I recall, it was cold and clear.

Q. Cold and clear. Do you recall any fogging of the windows of the cars?

A. There may have been some fog on the right hand window; you could see through it but as far as I recall it wasn't completely clear, but you could see the persons inside the vehicle.

Q. And do you recall whether there was any fogging on the left hand side?

A. I don't recall, sir.

Q. That was the side that you opened the door on, was it not?

A. Yes, sir. I looked in the right hand door and then I walked around back and opened up the driver's door, yes.

Q. And you don't recall whether there was any fogging on that window itself?

A. No, sir.

Q. When you pulled up behind the parked car there at the scene, do you recall whether or not your lights were off or on?

A. To the best of my recollection my parking lights were on. I don't recall my headlights being on.

Q. The dim lower lights?

A. Yes, the lower lights.

Q. And do you recall whether or not the lights were on in either of the other cars that were parked ahead of you?

A. No, they both had their lights off.

Q. Both had their lights off. About how long before Officer Pickeral got out of the car did you have the car under observation from the time you parked?

A. Just a few minutes; not very long at all.

Q. Now, once he got out of the car and went up to the [164] car ahead, did he ever return to your car?

A. He walked back to the vehicle and waved to me—he came back close enough—not completely to the car, but

close enough to have conversation—I mean, in other words, come on up, so far as I recall.

Q. And it was at that time that you put your car out of service and got out of the car yourself?

A. Yes, sir.

* * * *

[168] DIRECT EXAMINATION

Questions by the prosecution:

Q. Now, will you identify yourself to the court by giving your name, residence, occupation, and where you are located.

A. My name is George W. Pickeral. I live at 1121 Chepstow Lane, Falls Church, Virginia. Police officer assigned to the Third Precinct, primary duty working in a scout car.

Q. Third Precinct of the Metropolitan Police of Washington?

A. That is correct.

Q. Do you recognize the accused?

A. I do.

Q. And what's his name?

A. Commander Augenblick.

[169] Q. Now, I call your attention to the early morning of January 12, 1961 and ask you where you were at that time?

A. I was on routine patrol assigned in my scout car south of Constitution Avenue and the vicinity of West Basin Drive.

Q. And was anyone with you?

A. My partner, Officer Norman Round.

Q. And tell us what occurred and what you observed in that area?

A. I observed a late model Chevrolet, light in color, parked in the curb lane closest to the basin. I could see from approximately fifty feet back from where we were that there were at least one or two subjects in the car by the shadows in the car which were moving back and forth. We usually make it a practice to get through there that time in the morning. Each and every morning we work

the midnight tour of duty. Parked the car—I don't remember whether I was driving or riding the car. I got out of the car and approached this car who had out of state tags, California registration, if I remember correctly. I walked on the passenger side of the vehicle, looked into the window and observed the defendant, along with the other party, who was sitting on the passenger side of the car, in a crouched down position—slouched down position, I should say, in the car, with the defendant leaning over in his lap, at which time I went back to the car, advised my partner, Officer Round, what was taking place in the car.

IDC: I object to any hearsay testimony.

Q. Nothing that you said, Mr. Pickeral, but tell us just what you did and what he did?

LO: Well, I believe the defense has an objection, but I don't believe he's testified as to what he told somebody else.

IDC: I thought he was about to testify. I'm sorry.

LO: You may proceed.

[170] WITNESS: Officer Round got out of the car, and we both approached the vehicle again. Looking into the vehicle, we observed the party sitting on the passenger side of the vehicle in a slouched position, with his head just resting on the window sill of the car, with his privates exposed, and the defendant with his head laying in his lap, at which time I walked around to the curb windshield, on the same side of the passenger side of the car, to get a better look in the car, at which time the defendant apparently saw me or heard a noise and jumped up behind the wheel. When I walked from the side of the car to the front of the car, the engine was either running or had been started, and he moved two or three feet in an attempt to leave the scene, at which time we walked around to the driver's side of the car. I believe my partner, Round, opened the door, and he told them to get out; and it was plain to see that the man that was on the passenger side was a service man.

Q. Tell us how you knew that?

A. When he emerged from the vehicle, he was in a service uniform.

Q. What uniform?
A. Air Force.
Q. Go ahead.
A. I asked both parties for some legal identification, at which time the airman who was involved in the incident presented me with a service I.D. pass, and the defendant here presented me with a California operator's permit, if I remember correctly, at which time I asked him if he was in the service. He said he was. He presented me with an I.D. card of the Navy. I told him to get back in his car, his Chevrolet, and follow me to Number Three Precinct, where I charged him with disorderly conduct, and released them to the Armed Services Police within an hour's time after he was booked.
Q. Do you remember the name of the airman?
A. His last name was Hodges.
[171] Q. All right. Now, how was the accused dressed at this time?
A. I would say casual clothes.
Q. He was not in uniform?
A. Not in uniform, dress slacks, sport shirt.
Q. You told them to follow you to the Third Precinct Station?
A. Yes, sir.
Q. And they did?
A. They did.
Q. And within a short period of time, as I understand your testimony, they were turned over to the Armed Forces Police?
A. Yes, sir.
Q. Now, prior to the happening of this accident, had you ever seen Commander Augenblick before?
A. Never.
Q. Had you ever seen Hodges before?
A. Never.
TC: I believe you may inquire.

CROSS-EXAMINATION

Questions by the defense IDC:

Q. Did I understand that you don't recall whether you were driving or not?

A. That's correct.

Q. Do you have any custom as to who gets out of the car to investigate an incident when the police car is stopped?

A. No, sir.

Q. You have no set practice?

A. No, sir.

Q. Is it the usual practice that the one who is on the passenger side do the investigating?

A. Well, generally, but traffic conditions sometimes don't permit for you to get out or your partner to get out. There are no set rules or regulations as to who gets out.

[172] Q. But in the event one is getting out it's usually the passenger, is it not?

A. Not always.

Q. And you don't recall what occurred on this incident so far as who was driving?

A. As I told you when I was here before—

Q. I'm asking you what your testimony is today?

A. No, sir, I don't recall.

Q. Now, was there any other car in that immediate vicinity when you pulled up behind this one car?

A. There was.

Q. And where was that with regard to the car that you just testified you observed?

A. It was parked in front of the car. I don't know just how many feet.

Q. In front of the car that you were observing at that time?

A. Yes, sir.

Q. Did you make any investigation as to whether there was anyone in that car or who they might have been?

A. No, I didn't.

Q. Do you recall how long they remained there?

A. No, I don't.

Q. Do you recall whether they were there when you and Commander Augenblick's car moved away on the way to the precinct?

A. I believe they were still remaining at the scene when we left the area to take them to the precinct. The

car parked in front of the Commander's car, if I remember correctly, was still there when we left to take the Commander to the precinct.

Q. Now, did you advise the Commander or the airman at the scene what they were under arrest for?

[173] A. I don't recall whether I did or not.

Q. And the arrest which you noted on the book at the station house was disorderly conduct?

A. That's correct.

Q. Now, after you got the station house, do you recall where these men were asked to remain until the next incident took place?

A. We have a small room adjacent to where our switchboard is located, also arrest book, where we usually seat prisoners and people seeking information on traffic accidents.

Q. Now, and that's where they were put?

A. That's where they were put.

Q. Now, did you keep them under surveillance while they were in that room?

A. Not at all times, no.

Q. Do you know whether your partner, Mr. Round, did?

A. I don't recall.

Q. What other activity did you engage in yourself immediately after you brought them into the station other than booking them?

A. Notified the Armed Services by telephone.

Q. You did that personally?

A. Yes, sir.

Q. And did you do anything else?

A. No, sir.

Q. And did you wait until the Armed Services Police arrived?

A. I don't think I was there when the Armed Services Police removed them. I was there during the period of time when we talked to them. When they actually left, I wasn't there.

Q. What was the condition of the weather that night, Mr. Pickeral?

A. If I remember correctly, it was cold.

[174] Q. Was there any fogging or steaming of the windows of the car as you went up to it?

A. Yes, there was a small amount of fogging or steaming on the inside of the car.

Q. And was that as to all the windows, do you recall?

A. I don't recall whether it was all the windows or not. The window I looked in first was on the passenger side door glass which was fogged up. I proceeded up the side of the car to look in the windshield. The windshield wasn't steamed or fogged up.

Q. Do you recall anything on the dashboard of the car as you looked in the front of it?

A. No, sir.

Q. When you were still back in your own vehicle before you got out and went up to this car ahead, was the back window of the car that you were observing fogged or steaming?

A. It was steaming or fogged, as you say, to a certain extent, but not to the extent where you couldn't see the objects moving around in the car which was two men in the car, front seat.

Q. Now, through that fogging or steaming you were able to see, I believe you indicated or your used your hands—I was taking notes. I don't know whether you noticed—but the impression that I got was that there was a fogging of the persons that you observed?

A. There was movement in the car, moving around. When both heads went out of sight there was no shadows or no visual way that I could see in from where I was seated in the scout car, the time I got out of the scout car and approached the vehicle.

Q. There was no visual evidence of anyone above the seat of the car at that time?

A. Not from where I was viewing it.

[175] IDC: Would you indulge me for a moment, sir?

LO: Yes.

Q. Mr. Pickeral, did I understand you to testify today to the effect that this car moved two or three feet?

A. The car moved. I walked from the position where I was looking into the curb windshield in the front of the car.

Q. At that time was it moving?

A. I would say it was moving. The car was running.

Q. And while the car was moving forward, you walked in front of it?

A. Not intentionally, I wouldn't have done it under any circumstances.

Q. And did you walk in front of it unintentionally?

A. I did. A man could jump up from that position and turn the lights on the vehicle and have it ready to move in that short of time that I walked from the side glass to the front of it.

Q. And it is your positive recollection today that it moved two or three feet?

A. I would say it moved, possibly less maybe. Maybe less than two or three feet. I don't recall the exact feet.

Q. And when you gave testimony at a previous preliminary hearing, is it not a fact that you stated that the car did not move during the period of time that you were on the scene?

A. If it's down there, I said it. I'm testifying as near as I can remember. I'm not trying to add or take away anything.

Q. My question is: Did you previously testify that the car did not move? Do you recall your testimony?

A. I don't recall.

Q. And do you recall whether or not that you were aware of the motor being—running at any time while you were on the scene?

[176] A. If I remember, I stated that I didn't know whether the engine was idling or had been started.

Q. Did you hear a motor start while you were there?

A. I don't recall. I don't know whether it was the starting of the engine or racing of the engine.

Q. Isn't it a fact that all you were aware of or saw was lights being turned on as you, one or the other of you opened the door of the car?

A. No, sir, the car was running.

Q. It was?

A. The car was running, the engine was running.

Q. Now, when you first went up to the car, first observed it, where did you observe the defendant, Commander Augenblick, to be?

A. He was laying across the front seat of the car. He, like I stated, the passenger was in a crouched position with his head resting on the window sill door frame in the car, legs straight out across the transmission part of the car. The Commander was laying with his face—not straight down—but more or less to the side in his lap.

Q. And this was as you observed it from the front of the car down in, that is, the front of the windshield down into the passenger side of the car?

A. From the windshield and also from the side glass, as well as I could see through it.

Q. And it was the side glass that I believe you stated was fogged or steamed up?

A. That's correct.

Q. And where did you observe the defendant to be when you returned with Round?

A. In the same position.

Q. Now, do you recall testifying at a preliminary hearing previous to this?

A. I recall.

[177] Q. And do you recall this question being asked you at that time: "And at that time, where was the Commander Augenblick in relation to Hodges?" Answer: "As best as I can remember he was laying across the seat not with his face in his lap at that time."?

A. I said his head was turned to the side. His face was turned down, as I recall.

Q. My question is: Do you recall that testimony?

A. Yes, sir.

Q. And further the question: "At that time, he did not have his face in his lap?" Answer: "He did not; no, sir. No, sir, he did not."?

Do you recall that testimony previously given?

A. I don't recall the testimony exactly that you got written down there. I don't think you could expect me to. Its been sometime. I'll do the best I can for you to testify.

Q. Then your answer is that you don't recall so testifying or you do recall?

A. I do recall testifying at your preliminary hearing, yes, sir.

Q. And you recall testifying to those facts?
A. Yes, sir.
IDC: I have no further questions.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. Just one question, Mr. Pickeral. You said that you directed the Commander and Hodges to follow you to the —follow the scout car to the Third Precinct Police Station. How did Hodges get to the Third Precinct in what car?
A. He rode with the Commander.
TC: That's all. I have no further questions.
IDC: Nothing further.

* * * *

[178] DIRECT EXAMINATION

Questions by the prosecution:

Q. Will you identify yourself by name, residential address, occupation, and who your employer is?
A. Joseph P. Conner, Special Agent, Fourth District, Office of Special Investigation, USAF.
Q. And where do you live?
A. 2804 Terrace Road, Southeast, Washington, D. C.
Q. Do you recognize the accused, Commander Augenblick?
A. Yes, sir, I do.
Q. If you see him in the courtroom, will you indicate.
A. Seated on my immediate left.
Q. Now, calling your attention to the early morning of January 12 this year, can you tell us where you were?
A. Yes, sir, I was at the ONI Office at the Naval Gun Factory.
Q. And what was the occasion for your being there?
A. I had been notified by the Armed Forces Police as the OSI duty agent for Detachment Office located at Andrews Air Force Base that an airman—
IDC: I object to any further testimony.

TC: All right.

Q. As the result of some information given to you, you had gone to that base?

A. Correct, sir.

[179] Q. And who did you see there?

A. Airman James O. Hodges from Andrews Air Force Base.

Q. And who else, if anybody else?

A. The desk sergeant on duty and two agents from ONI.

Q. And do you know who they were?

A. I recall the name Mendelson. I don't recall the other one's name.

Q. Now, tell us what you did while you remained at the Intelligence Office over at the Weapons Plant?

A. I had an occasion to interrogate Airman Hodges.

Q. All right. Now, will you tell us briefly to the best of your recollection what he told you in the course of this interrogation?

IDC: I certainly will object to this.

TC: Well, I feel it is within the purview of the prosecution to rehabilitate the witness, Hodges, as a consequence of the cross-examination this morning. I think the doctrine permits such a thing.

IDC: I don't mean to belabor the point, but it is the most obvious kind of hearsay, as I don't recall off hand what the rehabilitation purposes would serve. But in any event, it certainly is hearsay. This was not in the presence of the accused.

TC: True. Now, I have a legal argument to present which I think will justify my pursuing this line, and I'm prepared to do it now or do it in the absence of the court, depending upon what the law officer feels should be done and what the defense counsel—perhaps we can clarify it or make it unnecessary.

LO: Do you withdraw your previous question?

TC: Well, I will withdraw it temporarily, if I may be permitted. Once this thing is resolved, I want to again, if I'm correct in my estimate of the law.

[180] LO: Very Well.

TC: All right. Let's say that the question is withdrawn. Part of the cross-examination, if it please Your Honor, of Hodges this morning, went to the question of whether or not his Commanding Officer had assured him that he would be recommended for an honorable discharge. Now, I consider that the only possible relevance of that —and that was established that Hodges said that he had been assured some three weeks after the incident. Now, as I view it, the only possible relevance that item of information can have is the suggestion that Hodges testified in the manner he did here, the consequence of being assured a recommendation for an honorable discharge. And if the defense will disclaim any such significance to the question, then I won't pursue this any further.

IDC: I see no connection between a recommendation which his Commanding Officer stated he was going to make and any statements which he made to this OSI agent. I see no connection whatsoever what he said that morning. That he was assured later by his Commanding Officer has no relevance whatsoever to the OSI Branch of the Air Force, and it is still hearsay to have this man repeat what someone told him.

TC: May I cite you, if it please the court, United States against SLEDGE, 20 CMR 283, and 6 USCMA 567. I'm referring to the general doctrine announced in the Manual that a witness in general does not take on added credibility by evidence that at another time he said the same thing. But, now I'm quoting the Manual: In certain instances there are exceptions where the witness' testimony is discredited by implication of bias, prejudice or motives to testify falsely; consistent statements made prior to such imputed corruption are admissible. And the Sledge case says this, at page 285 in the CMR: "The clear purpose behind defense counsel's questioning was to impute Sergeant so and so a motive to testify falsely . . . The attempt to discredit so and so's testimony originated [181] with the defense. Because of this attempt, the prosecution could properly rehabilitate the witness by means of a prior consistent statement."

Now, if the defense will say that the purpose of introducing this evidence as to a recommendation for honorable discharge was not to suggest that Hodges had that reason for testifying as he did, then I'll stop right here.

IDC: Had what reason to testify? I'm not sure myself now.

TC: The reason that he was offered a recommendation for an honorable discharge in exchange for his testimony in this case.

IDC: I can only say this to the court: That it is not up to the defense to state the reason why Hodges testified. The fact is that is essentially for this court to decide, as a matter of fact. The fact is that he was asked and answered, yes, that he was told by his Commanding Officer that he would be recommended for an honorable discharge. Now, as to the reason for it, the background for it, whatever, I submit it is for this court to determine —as a matter of fact, all the inferences that a court would normally deduce from any testimony that's given. It's not for us to say.

TC: Well, if it please the law officer, I still find no disclaimer on the part of the defense that this was his purpose in eliciting that information. If that wasn't the purpose, I see no relevance to it at all. I'm perfectly willing to terminate this right here.

IDC: I make no disclaimer. I've answered, I think, what our position must be, that it is for the court to determine, not us.

LO: At this particular point, I would like, if the president has no objection, about a ten minute recess.

PRES: All right.

The witness was duly warned and withdrew from the courtroom.

The court recessed at 1338, 8 September 1961.

The court was called to order at 1358, 8 September 1961.

PRES: The court will come to order.

[182] TC: All parties to the trial who were present when the court recessed are again present in court.

LO: Are counsel prepared for ruling at this time?

IDC: Yes, sir.

LO: I realize that there are certain exceptions to the general rule that prior consistent statements of a witness corroborating his trial testimony are inadmissible. I feel at this particular point of the trial and the situation as it now exists, the motion of the defense should be granted, and it is so granted. Perhaps I should say the objection is granted.

* * * *

[191] DIRECT EXAMINATION

Questions by the prosecution:

Q. Would you state your name, rank, armed force, and present duty station.

A. My name is Emerick S. Kelone, Commander, U. S. Navy. Present duty station, Staff CINCNAVEU.

Q. Do you know the accused?

A. Yes, I do.

Q. Would you point to him in the courtroom.

A. Commander Augenblick (pointing).

TC: Thank you, sir. Your witness.

Questions by the defense (IDC Mr. Kendrick):

Q. Commander Kelone, how long have you been a Naval officer?

A. About fifteen years, sir.

[192] Q. Would you tell us how you received your commission, sir.

A. I was commissioned during the time of World War II as a Mustang Officer. I was commissioned from enlisted man.

Q. And how long prior to that time had you served in the Navy as an enlisted man?

A. Ten years.

Q. And you, of course, have testified to the fact that you know Commander Augenblick. How long have you known Commander Augenblick?

A. About two and a half years.

Q. Commander Kelone, I am going to stand across the room here because you have a tendency to talk a little

low. If I stand over here (pointing) and more or less shout at you perhaps you will shout back.

A. Yes, sir.

Q. How long did you state you have known Commander Augenblick?

A. About two and a half years.

Q. And where did you first come to know him, sir?

A. I met him on taking command of the Twining. He was the Commanding Officer of the Porterfield at that time. Both of those ships were in DesDiv 172.

Q. And are both of those ships destroyers?

A. Yes, they are.

* * * * *

[198] Q. Going back for just a moment, sir, to the matter of drinking, have you ever noticed anything which you would consider noteworthy in his behavior after he has had some indulgence in alcohol?

A. He gets sleepy. With the four of us, invariably, after we had had a long night or would be tired, Dick would be the first one to take a nap while we were waiting for the boat or on the drive back to the ship or something of this sort. It was quite a joke for all of us how he would take little naps occasionally. It was done very quietly, but he would just drop off to sleep.

Q. Well, was it the sort of thing that you would call "passing out?"

A. No, not out. He would just be plain asleep, and when time came to move he would certainly move and go along with the rest of us.

Q. Do you recall any instance of this happening while you were actually seated or standing around a bar drinking?

A. I believe one evening when we were on Okinawa, during the Christmas season, we were at one of the Army or Air Force Clubs on Okinawa, and towards the latter part of the evening Dick went to sleep. We were getting such a joke out of it that we were asked to leave the club —politely of course—but it caused quite an event.

Q. Would you characterize it as a "falling apart" in his manner, or how would you typify it?

A. No, only very quitely, very sedate, proper and peaceful. He would just be sitting there and just plain go to sleep.

* * * * *

[209] DIRECT EXAMINATION

Questions by the prosecution:

Q. Colonel, would you identify yourself for the court, giving your name, rank, armed force, and present duty station.

[210] A. My name is John Francis Hill, Colonel, U. S. Army. I am the Executive Officer of the Third Armored Division Artillery, currently stationed in Hanau, Germany.

Q. And do you know the accused Commander Augenblick?

A. I do.

* * * * *

[215] Q. Now, sir, on any of the occasions that you have seen him socially when he was doing any drinking, have you ever noticed anything which you would consider noteworthy about his actions as a result of some degree of drinking?

A. Well, I have seen him on at least two or three—at least two—and probably three occasions. One I remember very well. That one was at a party given for him by a lady friend here in town. Another one was once in his own apartment; a third, if I remember correct, was at my house. And that is, sir, that he goes off in a corner and has a "cat nap" and then returns to the party refreshed. I didn't take particular note of it because this officer (Commander Augenblick) is a highly, organized, nervous individual who works extremely hard. He puts himself a thousand percent into what he does and he burns himself out. I think he needs a chance to recuperate and rebuild his nervous system, as it were.

[216] Q. And I wonder if you could tell us just a little more about how this form of taking a "Cat nap" takes place?

A. Well, on two or three occasions that I remember vividly, he just would move over to the side of the room and sit down and take a cat nap for ten or fifteen minutes. And at all of these parties, there were small groups, they all knew him well, and it wasn't thought to be unusual at all.

Q. Would you characterize it as a passing out sort of thing?

A. No, I used the word "cat nap" and that's what it was. It is a highly desirable thing to be able to do. I wish I could do it, frankly.

* * * *

[235] DIRECT EXAMINATION

Questions by the prosecution:

Q. Will you identify yourself by giving your name, rank, armed force, and present duty station.

A. Richard G. Augenblick, Commander, United States Navy, U. S. Naval Station, Washington, D. C.

* * * *

[248] earlier than I would have left or wanted to leave, but I was there at seven. This party lasted until nine, although Admiral Burke left, I guess, pretty much earlier than that.

Q. Were refreshments served at the party?

A. Yes, sir.

Q. Did you have anything to drink yourself?

A. Yes, sir.

Q. What were you drinking, if you recall?

A. I was drinking scotch and water, not much water.

Q. Now, approximately how long did you remain at the party?

A. I left the party a little after—I looked at my watch. It was after nine o'clock. So, I figured it was time to leave about 9:10 or so, and I left then, although a lot of people were still there. They had had skits put on as a sort of a farewell gesture for the Admiral, and they had a presentation of momento to him and that was completed. It still didn't break up. I left about 9:15.

Q. Where did you go from there?
A. I went home.
Q. Where is your home?
A. 1850 Columbia Pike, Arlington, Virginia.
Q. What did you do there?
A. Well, I thought about going back to the office, but having had some drinks, I didn't do that. It was then about 9:30 or thereabouts, and I didn't have and don't now have a T.V. If I did, I probably would have just stayed home. It was 9:30. I had been to a party, and I didn't feel like turning in. I had no T.V., so I went out. I went up Columbia Pike to a place called the Virginia Inn, a restaurant with a bar, beer bar. It's a fairly respectable place in the neighborhood. They have television.
[249] Q. And what did you do there?
A. I had a few beers. I don't know how many. I had been drinking scotch all the time at the party, but then I drank beer afterwards.
Q. And how long did you remain there at this Virginia Inn?
A. I don't remember exactly.
Q. Approximately?
A. I would say less than an hour, maybe three quarters of an hour, maybe less even. Then I went to the Officers' Club of the South Post of Fort Myer, which is an informal Officers' Club, and I sat at the end of the bar in the back where I could watch the T.V. which was on. I stayed there until they were getting ready to close the place up.
Q. And did you have anything more to drink there?
A. Beer.
Q. And about what time did they indicate they were going to close?
A. Well, nobody said anything, but I could see they were getting ready. So, I left there about 11:15. At this time, I didn't feel like turning in, and I decided I'd go into Washington.
Q. Why did you decide to go into Washington.
A. Well, I wanted a nightcap, and I very seldom go to Washington—I mean, I very rarely, particularly downtown Washington—very very rarely go there. And I didn't

have any place in mind to go to actually. I drove around looking for a parking space.

Q. This was after you came into town?

A. Yes, sir. I found a parking space on Eleventh Street—no, it was on "E" Street near Eleventh.

Q. That's Northwest?

[250] A. Yes, sir. There was a bar across the street. I went in this bar. They had T.V. going. I watched T.V., and I had some more beer.

Q. And do you recall approximately how long you remained there?

A. Not exactly. Approximately, it must have been about an hour, maybe less. I was just starting to get tired while I was there. They had, as I recall it, one of these late shows or some sort of program on the T.V. that I stayed to the end of, and when that ended, I left. I was slowing down in my drinking, and I was very tired, extremely tired.

Q. This would have been about what time approximately?

A. About 12:30 about.

Q. And what did you do at that point?

A. Well, having had duty for quite a while in California and having been conditioned about the driving of a car under these conditions, I decided to get a cup of coffee.

TC: If it please the court, if the witness sticks to precisely what he did rather than the reflection that he indulged—

WITNESS: I'm sorry.

Q. Well, as a result of whatever you decided, what did you do?

A. I wanted to get a cup of coffee.

Q. And did you get a cup of coffee?

A. I did.

Q. Or go to a place and get one?

A. There was, I think, a White Tower Restaurant nearby, and I walked over and sat down and ordered a cup of coffee. This coffee wasn't helping me very much. I was getting more and more sleepy. I was very very tired.

Q. Now, was there anyone else, that is, a customer in the restaurant, or whatever you call the place, other than yourself?

A. As I remember it, there was only one other customer. This was Hodges.

[251] Q. Now, had you ever seen him before?

A. No, sir.

Q. Did you know him at all?

A. No, sir.

Q. Did there ensue any conversation between you and Hodges?

A. There did.

Q. Can you recall what it was?

A. Hodges said that he was waiting for a bus, and that it was going to be a long wait. I thought he was going in my direction, and I figured that it would be good to have somebody to talk while I was driving to help keep me awake.

Q. What led you to the conclusion that he was going in your direction?

A. Well, the bus station where I live in Virginia is right a stone's throw away there, and that's where I get the bus when I want to come home. To Washington, I would get the bus there. You can see the stand right there. All those buses go over into Arlington, Alexandria, Barcroft. It's the bus station for that area.

Q. And was he in uniform at that time?

A. Yes, sir, he was.

Q. Did you recognize what type of uniform it was?

A. Air Force.

Q. Was it your impression that there was any Air Force installations over in the vicinity where you were going?

A. I know that there are a lot of Air Force people at Fort Myer, and the complex of bases around Washington is such that—

TC: I think I will have to object to that. I don't think it's responsive.

IDC: Very well. I'll rephrase the question.

LO: Do you withdraw it at this time?

IDC: Yes, sir.

LO: Very well.

[252] Q. Now, did he say specifically where it was that he was waiting to go by bus?

A. I don't recall. Just said he was waiting for a bus, and it was going to be a long wait.

Q. And did you then offer him a ride?

A. I told him I would give him a ride as far as I was going in his direction.

Q. Was that accepted?

A. It was. He seemed pleased with the prospect.

Q. And what did you do then?

A. We went out to the car, and I drove up "E" Street diagonally across Pennsylvania Avenue, as I recall it, to Fourteenth Street and turned left, despite the fact that I think there is a sign there that says "no left turn." I think I followed another car, although I'm not positive. And we drove along Fourteenth Street heading towards the Fourteenth Street Bridge. When we got to the area around the Bureau of Engraving and Printing there or the Jefferson Memorial, he said, "This is the wrong direction. We are not going the right way for me."

Q. Now, going back just a moment, Commander, to the time that you got into the car and on up to the point where you have just testified, did there come a time that you offered him a drink?

A. No, I did not.

Q. Did you have a bottle of some whisky or anything in the back of the car?

A. Absolutely not.

Q. And you have heard the testimony here to the effect that you offered him a drink during that time?

A. Yes, sir.

Q. Is that correct or not?

[253] A. It is absolutely not correct.

Q. There has also been testimony, Commander, to the effect that you identified your car as being your uncle's car. Would you state whether that is correct or not?

A. It's not correct, absolutely, absolutely.

Q. All right, sir, we have come forward to where he stated to you that this was not the right direction for him. What did you do at that point?

A. I made a mistake. I should have put him out then and there, but—

TC: I ask that that be stricken. That's not what the question was.

LO: It will be so stricken. The court is instructed to disregard it.

WITNESS: I'm sorry.

Q. Commander, will you try to restrict yourself to answering my questions.

A. Yes, sir.

Q. What did you do at that point?

A. What I did was the result of what I thought.

Q. I think without objection you may state what you thought and as a consequence what you did?

A. I thought I had sort of an obligation to take him back into town, that I shouldn't leave him there, and the road that I know of to get back in town is a road which turns right just before the Fourteenth Street Bridge and goes around sort of a circle back into town.

* * * *

[258] LO: The stipulation will be accepted. Now, before proceeding, I believe the witness just indicated that previously a mark has been made erroneously on the chart.

WITNESS: It was Fourteenth Street that I took. This is Fourteenth Street (indicating). So that was the street, this one (indicating). This apparently is some place (indicating)—

Q. I think what the law officer is referring to, Commander, is your indication that there was some correction in the point at which you think this statement was made to you?

A. This, I believe, is the correct route here (indicating). It was Fourteenth Street.

Q. Sir, if would listen to me for just a second. I believe the law officer was indicating that you in your testimony a moment ago indicated that it was at some other point than that which you have marked where this airman made the statement to you that this is the wrong route?

A. No. The statement, as I recall it, was made after the Bureau of Engraving and Printing and in the areas of the Jefferson Memorial about here (indicating). This is where the statement was made and I marked it with an "X" here (indicating).

Q. That is the area which would be your present recollection?

A. That is correct, sir.

Q. Now, we will assume that you have now completed this turn into this area which is marked West Basin Drive. Did there come a time when you stopped the car?

A. There did.

Q. Why?

A. Well, I was very very sleepy. It was almost a compulsive feeling of fatigue, and I felt that it was unsafe to drive, that I should stop and not drive any more. I, however, even with this feeling drove on up across that [259] bridge up West Basin Drive until I saw a car, and I stopped behind this car. There were no other cars until I came to this one, and I stopped behind this car.

Q. What was your theory in stopping behind this car?

A. Well, I didn't want to be in a desolate place.

Q. And did you make any statement to your passenger as to why you were stopping or the circumstances or whatever?

A. I think he understood that I was—

Q. No, my questions is: Did you make any statement to him that you recall?

A. I think there was a statement, but I don't remember what it was.

Q. Well, on stopping the car, what did you do then?

A. I went to sleep.

Q. Well, did you—first of all, do you recall whether or not you turned out the lights?

A. I turned out the lights.

Q. Do you recall whether or not you turned off the motor?

A. I turned off the motor.

Q. And you state that you then went to sleep?

A. That is correct, sir.

Q. And what position did you go to sleep so far as you recall?

A. I'm not sure, but I think I turned toward the window on my side.

Q. In other words more or less slumped or crouched over against the window on your side of the car?

A. Yes, sir.

Q. And what was the next thing of which you were conscious?

A. The next thing of which I was conscious was the flashlights or a flashlight, there may have been one or two, and the voices of the policemen.

Q. And what occurred then?

[260] A. The policemen said to get out of the car.

Q. And did you?

A. I did.

Q. And did the airman get out of the car?

A. He did, sir.

Q. What occurred then?

A. The policemen asked me for identification.

Q. Did you furnish him identification?

A. Yes, sir, I furnished him with my driver's license and my I.D. card.

Q. And what occurred then?

A. He said, "Follow us to the police station."

Q. Now, will you state whether any statement was made to you on that occasion as to why in the first place you were asked to get out of the car and identify yourselves and then follow the police to the police station?

A. They made no charges. They made no allegations, no statements, nothing to me.

Q. Now, Commander, I want you to consider my question very carefully. You have heard testimony to the effect on the part of this airman that on this morning while parked in this car at this location, you attempted and did commit an act of oral sodomy on him. I want you to answer whether or not that is true?

A. Absolutely untrue.

Q. You have heard further testimony to the effect that shortly after you stopped and went to sleep on your side of the car that you then turned and began to, as he described it, massage the area of his privates and thereafter he exposed himself, that you took hold of his penis and then committed this act. I want you to state to this court, is that true or not true?

A. I don't know what he did, but I did no such thing.

* * * *

[261] Q. Commander Augenblick, have you ever committed an act of homosexuality with a male?

A. No, sir.

Q. Have you ever entertained the desire to commit an act of homosexuality with a male?

A. No, sir.

Q. Now, Commander, on the way to the police station, did the airman ride with you or was he in the police car?

A. I believe he rode with me.

Q. Now, on the way to the station, will you state whether any conversation took place between you and the airman?

A. I remember no conversation. I was completely shocked by this situation and confused and was trying to figure out what it was all about. Here was this situation here and—

* * * *

Q. Now, you have heard testimony on the part of the airman to the effect that on the ride to the station you in a sense preped him on a story to tell the police that the two of you had stopped to take a leak and then to get some rest. I ask you at this time whether that is true or not true?

[262] A. I didn't prep him at all. It's not true.

Q. You have also heard testimony to the effect that when you reached the police station that you again repeated this same story and had him repeat it to you so that you could make certain that he was going to tell the same story that you were going to tell. I ask you is that true or not true?

A. When we reached the police station, I did talk to him. I asked him, "Did anything wrong happen?" I asked him this two or three times. He said, "No." There was no preping.

Q. And in answer to my specific question, you deny the statement that he testified to that you again had him repeat the statement which had originated in the car?

A. Absolutely, absolutely, I merely asked—

* * * *

Q. And about how long did that interview last between you and Agent Mendelson?

A. About two hours.

Q. And did he advise you of what the charge was that was being brought against you?

A. He did.

Q. And upon being advised of the nature of the charge, what did you say to him?

A. I denied it absolutely from the outset, and I said there was no—

TC: I object to this. We've gone into this before. I don't think that it is pertinent for the witness to testify as to what he previously said. It is selfserving and hearsay.

* * * *

[285] DIRECT EXAMINATION

Questions by the prosecution:

Q. Now, would you identify yourself, Captain, by giving your name, rank, armed force, and present duty station?

A. Frank Whitby, Jr, Captain, United States Navy. I was recently detached as Assistant Chief of Naval Personnel. I am to report to Commanding Officer of a ship the 1st of October. So, sir, I am between duties.

Q. Yes, sir, and do you know the accused Commander Augenblick?

A. I do.

* * * * *

[291] Q. One further question, Captain, which I overlooked earlier: On the social functions—social occasions—that you have been with Commander Augenblick and he in your company, have you on any occasions noticed any change which you would care to comment on after [292] he has had some indulgence in alcohol?

A. You are speaking now of recently or at any time?

Q. At any time that he has been observed by you? Have you noticed any condition or change in his manner?

A. Other than—yes. Well, we all experience a little change when we have a few drinks, I suppose, and we certainly do. We spent a lot of time at sea, would sit around the clubs often, and we had a number of drinks together. He reacts a little. His reaction was most normal, except I do remember one thing which perhaps could be attributed to the fact that he was the most conscious commanding officer on these trying cruisers. He apparently lost a lot of sleep. He had a habit of occasionally dozing off, not have reached the point mind you of being intoxicated or anything of that nature, but while we would be talking, his head would nod. I remember this happening a few times.

Q. Sir?

A. I remember this happening a few times.

* * * *

[313] PRES: In closed session with the members of the court, we decided we would like to have a rereading of the testimony of the police officers.

LO: Of the two police officers?

PRES: Two police officers.

LO: All right, sir.

* * * *

[314] The law officer read the prior testimony of Officer Pickeral.

LO: I'll now ask counsel if I have read correctly from the transcript furnished me?

IDC: Yes, sir.

TC: Yes, sir.

The law officer read the prior testimony of Officer Round.

LO: I will now inquire of counsel if I have read correctly from this transcript?

IDC: Yes, sir.

TC: Yes, sir.

* * * *

[315] The law officer read the prior testimony of Airman Hodges.

LO: I would like to inquire now of both counsel if I have read correctly from the transcript furnished me?

IDC: Yes, sir.

TC: Yes, sir.

LO: Does that satisfy the court's request?

PRES: I'm sorry.

LO: Now that I have read the testimony of these three witnesses for the court, Captain, I was wondering now—

PRES: We would like to close the court to decide whether we need a recall of these people.

* * * *

[316] PRES: We, the members of the court, in closed session, decided we would like to recall the officer witnesses, and we have the questions that we would like to put to these officers. Now, sir, is that the proper procedure, or do we submit the questions to you for the decision to recall them?

LO: I believe it might save time, Captain, if you would pass to me the general area of questions that you desire to ask of these witnesses.

PRES: I think then we can resolve the issue.

The president of the court handed the law officer a document.

LO: I believe these questions, Captain, are very pertinent. I would suggest that the trial counsel inquire as soon as he is able to do so as to the availability of these two officers and when they could be called to testify. From the nature of the questions that the President has handed to me, for record purposes, they will be identified as Appellate Exhibit 5.

* * * *

[320] DIRECT EXAMINATION

Questions by the prosecution:

Q. You are Officer George Pickeral of the Metropolitan District Police?

A. Yes, sir.

Q. And you are the same Officer Pickeral who testified here the other day in this case?

A. Yes.

Q. And you are reminded that the oath that was then given you is still binding.

A. Yes, sir.

LO: Officer Pickeral, there are certain questions the court would like for me to ask of you.

EXAMINATION BY THE COURT

Questions by the law officer:

Q. Sir, they are as follows. Directing your attention now to the early morning of 12 January 1961 at West Basin Drive, Washington, D. C., during the time that you made certain observations which you have described to the court, would you inform the court of the lighting conditions in or at the scene—whether they be natural or artificial lighting, sir.

A. Artificial lights, street lights. It wasn't generally the type that's directly mounted on top. The globe and pole effect is more in an arched-over effect that goes along the river, more on the side stretch and the main drag to the city.

[321] Q. Can you describe the distance that the light or lights may have been from the car which you made your observations?

A. No, I wouldn't know. I wouldn't care to state that. I don't know, really.

Q. Now, can you describe to the court whether or not there was any moonlight or any other type of light other than the artificial lights you described?

A. Well, I would say between the moonlight and what light was provided by the streetlights it was enough light for me to see what was going on, yes.

Q. All right. Sir, you have testified to approaching the vehicle which Commander Augenblick and one Hodges were located, I believe, on two occasions, and on the second occasion walking toward the front of the passenger's side of the windshield and making an observation. At any time during your observations could you state what rela-

tionship or connection, if any, there may have been between the mouth of Commander Augenblick and the private parts of Hodges?

A. It was not very close contact but mainly in the area. Like I say and like I testified here the other day, the head of one subject was turned to the side and not directly faced down in the lap of the party who was slouched or crouched in the passenger's side of the vehicle there. I would say it was more around the lips of the mouth than actually in the mouth, closer to that than actually inside the mouth, sort of around the face, sir.

Q. All right. Now, you say the face was turned which way?

A. Facing the floorboard or the dashboard of the car.

Q. And that would be the face of Commander Augenblick?

A. Yes, sir.

Q. And what position did you observe when you made the observation of Commander Augenblick's face? Was it turned towards Hodges' private parts, away from it, or just how?

[322] A. Well, with respect to the dashboard of the car, his head was between his penis and the dashboard. In other words, his face was between the dashboard and the head of the subject, laying across the one that was slouched down in the seat.

Q. Then to be more specific would you describe the direction that Commander Augenblick's face was in with relation to the penis of Hodges.

A. Well, I would say his face would be laying in this direction and would be laying on the right side of his face between possibly his belt line and where his pants were unzipped and finished unzipping there, somewhere in that vicinity.

Q. All right, sir. Did you make any observation as to the hands of Commander Augenblick with relation to the privates of Hodges?

A. No, sir.

LO: I would like to inquire if that is sufficient for the court's purposes?

PRES: I think that the law officer still has a question in his mind, the same question that we have, as to the

exact relationship of the accused's face. Would you please straighten that out.

LO: Yes. Mr. Pickeral, could you do this, using yourself as you are sitting there, can you describe by pointing the location of Commander Augenblick's head to Hodges, using yourself as Hodges, and the direction which you say his mouth, nose and eyes were pointed.

A. Well, I would rather not put myself in that position.

Q. Well, I don't mean for you to expose yourself. I mean merely to indicate to the court exactly where the accused's head was located, on your body, so they can know what you saw in the car.

A. Well, Hodges was almost in a laying position, mostly lying in a reclined position in the car. From that, I would say in an angle about like this (indicating), with his head resting back over on the window sill of the car. The Commander's head was in this area, right in here, I would say, from here to right about there, as near as I could tell (indicating).

[323] Q. And his face was pointed in which direction?

A. Towards his penis, towards the dashboard of the car, looking down towards the floor, so to speak.

Q. In other words, then, if we start with the mouth, nose and eyes of Commander Augenblick, the next thing we would see would be Hodges' penis, and then continuing forward would be the dashboard of the car?

A. That is correct.

LO: Is that sufficient? Does that clarify it?

PRES: Yes.

LO: Do you have something further?

PRES: There is another similar to one of your last questions.

MEMBER: Same one.

LO: This is an additional question asked by a member of the court.

I will mark this as Appellate Exhibit 6. The question is, did you observe where Commander Augenblick's hands were or what they were doing at any time during these observations?

A. I didn't observe his hands at any time.

LO: All right. Sir, are there any further questions?

MEMBER: I am not clear.

PRES: You are not (handing a document to the law officer).

LO: Let me ask you the specific question now of a member of the court, which I will mark as Appellate Exhibit 7.

At any time during these observations, Officer Pickeral, did you observe Hodges' penis in the mouth of Commander Augenblick?

A. I wouldn't say it was in the mouth as much as it would be around the lips of the mouth of the party who was laying across his lap. I wouldn't say it was in his mouth to any extent, no, sir.

LO: Are there any further questions by the prosecution?

[324] Questions by the prosecution:

Q. You mentioned artificial lighting in response to one of the questions from the court. Now, it's true, is it not, that there is this street lighting that you mentioned there was which is forward of this car in which you observed these two?

A. I really couldn't say, Commander. I don't recall where the light was situated in respect to where the car was parked.

Q. There was testimony the other day that there was another car at the scene. Is that your recollection, that there was another car?

A. Another car parked in front of the Chevrolet.

Q. Right. And isn't there a light just beyond that where that car was parked?

A. I couldn't say for sure. I would say it was a good 200 feet apart along the point there, but I couldn't say.

Q. All right. No more from the prosecution.

A. Yes, sir.

CROSS-EXAMINATION

Questions by the defense (IDC Mr. Kendrick):

Q. Was Hodges' penis erect?

A. I wouldn't say fully erect, no.

Q. And you, when you said a moment ago in answer to the law officer's question about your observation as to the penis being in the mouth, you said "not to any extent". Do I understand that to mean that it was not in the mouth, is that correct?

A. I said more or less around the lips. I couldn't tell whether it was in it to any extent or not, but what appeared to me and from what I could see it looked like it was just more or less a kiss of it. I couldn't say that it was in his mouth all the way, no, sir.

IDC: No further questions.

LO: Anything further from either counsel?

TC: Not from the prosecution.

[325] LO: Are there any additional questions of this witness by any member of the court?

PRES: No.

LO: Very well. Officer Pickeral, you are excused. Thank you very much for returning.

We will now hear Officer Round. Would you like the same questions asked again?

PRES: I think so, and that last question, too, unless it's elaborated on, can be.

LO: All right, sir. Call Officer Round.

Officer Round entered the courtroom and resumed his seat on the witness stand.

EXAMINATION BY THE COURT

Questions by the prosecution:

Q. Now, you are Officer Norman Round of the Metropolitan Police of Washington, D. C.?

A. Yes, sir, correct.

Q. And you are the same Officer Round who testified here the other day?

A. That's correct, sir.

Q. And you are reminded that the oath which was admistered to you then is still binding.

A. Agreed, sir.

Questions by the law officer:

Q. Officer Round, there are certain questions the court would like for me to ask of you.

A. Yes, sir.

[326] Q. Directing your attention again now to the early morning of 12 January, 1961, on West Basin Drive, Washington, D. C., you have testified here as to certain observations that you made concerning the accused and one Hodges?

A. Right.

Q. Would you describe for the court the lighting conditions in that area, whether they be artificial or natural lighting at the time in question.

A. Well, West Basin Drive is artificial lights, they are over-hanging type lights, I'd say. There is one on either side of the street approximately every 35 or 40 yards, and on each side of the street there is a large, over-hanging light. You can see clearly in that vicinity.

Q. Do you recall where any such lights may have been in relation to the car occupied by the accused and Hodges?

A. No, sir, off hand I couldn't. I couldn't estimate the nearest one.

Q. Did you make any observation as to the moon condition on that evening?

A. No, sir, I don't recall.

Q. All right, sir. Now, you have testified as to what observation you made in relation to the accused's head and the penis of one Hodges.

A. Yes, sir.

Q. Would you describe to the court what connection or relationship there was, if any, between Hodges' penis and the mouth of Commander Augenblick?

A. I did not see any connection. All I could see was the head of the defendant down in the other person's lap. I only observed that for a few seconds. His head raised up. At that time, I saw the penis of Hodges. I did not see his penis in the Commander's mouth.

[327] Q. Now, you say you saw the accused's head in the lap of Hodges?

A. Yes, sir.

Q. With relation to the eyes, nose and mouth, where was those parts of the accused's head in relation to the privates of Hodges, and I am asking that now, meaning was it away from it, toward or to the side, if so, describe in detail to the court exactly the relationship?

A. The accused's head was faced downward. I was observing through the glass door; looking down I could see the top—the back of his head—where his face was down towards Hodges' lap, but what or anything else other than that I couldn't see.

Q. I see. During any other time that you made your observation, did you have an opportunity to see the hands of Commander Augenblick?

A. I don't recall seeing his hands, no, sir.

PRES: Would you ask the similar question of this witness that you asked of the other one concerning his own position.

LO: If you would, Officer Round. . . ?

A. Yes, sir.

Q. For the moment, consider yourself to be Hodges. Would you demonstrate to the court how you saw Hodges sitting in this seat and then indicate with your hands where the head of the accused was with respect to Hodges.

A. Now, if you assume this is the side of the car, the right hand side, and this is the back seat (indicating), Hodges was slumped down like this (demonstrating), with the head of the accused approximately here (indicating). the back of his head was about here (indicating).

Q. Would you describe that for the record now, the area that you just indicated, on your own body.

A. Hodges was slumped in the seat with his head on the back of the passenger's seat and the head of the accused was down approximately where his groin would be, above his groin.

[328] Q. Would you indicate where a normal belt buckle might be worn?

A. Possibly, yes, sir.

Q. What relationship would that have to the head?

A. I would say his head was down close to that. This is an observation made over a period of a few seconds.

LO: Did everyone have an opportunity to see the demonstration from the witness? Are there any further questions of this witness by the court and have I clarified the questions for you?

* * * *

[366] LO: Now that you have heard the evidence, gentlemen, the time has come to instruct you concerning the law governing this case. * * * *

* * * *

[368] Looking now to the offense for which this accused is now on trial, he is charged under the Charge and the Specification thereunder with an offense of sodomy as a violation of Article 125 of the Uniform Code of Military Justice. This article provides, in part, that any person subject to the Code who engages in unnatural carnal copulation with another person of the same or opposite sex is guilty of sodomy. With respect to the essential element of sodomy as alleged in the Specification under the Charge, you are advised that in order to find the accused guilty of this offense you must be satisfied by legal and competent evidence before you beyond a reasonable doubt, that on or about 12 January 1961, at West Basin Drive, Washington, D. C. (District of Columbia), the accused engaged in unnatural carnal copulation with James O. Hodges, Jr., airman third class, U. S. Air Force. It is unnatural carnal copulation, and therefore, sodomy for a person to take into his mouth the sexual organ of another person. Penetration is required for the offense of sodomy but any penetration, however slight it may be, is sufficient to complete the offense. And I might deviate for one moment. I believe there is some testimony relating to a description, [369] I believe, of lips against the penis of another person. If there is mere oral-genital contact without penetration of the organ into the mouth it is not sodomy irrespective of any other consideration. As I have indicated, mere contact is not enough. Penetration is required. However, it is not necessary that an emission occur for the offense of sodomy.

* * * *

[380] PRES: We need assistance in putting the findings in proper form.

LO: Let the record show the hour is now 1122, 13th day of September 1961. I understand, Captain Coleman, that you have requested the law officer and the reporter to come in and assist the court in putting its findings in

[381] proper form.

PRES: Yes, sir.

LO: Now, has the court reached its findings?

PRES: We have.

LO: What is that finding?

PRES: Is it proper for me to disclose it to you?

LO: Yes.

PRES: We find him guilty by two-thirds to the lesser included offense specification.

LO: In other words, the court has reached its finding of a commission of an indecent, lewd and lascivious act and you desire my asssitance in helping you put that in proper form?

PRES: That is correct.

LO: All right, sir. First of all, Captain, can you tell me if this is correct—as I understand it now, Captain, the court did not find that the accused committed sodomy with Hodges. Captain, can you tell the nature of the lewd and lascivious and indecent act the court, by two-thirds majority, has found established?

PRES: The act iself?

LO: That's right.

PRES: I might say that which transpired in that automobile during the time. Do you want specifics?

LO: Yes, sir. Have you actually made that determination as of yet?

A MEMBER: Not in detail.

LO: Perhaps it would be better at this point then that I withdraw in order that you can complete your findings because I cannot give you any instruction here in the closed session without that. But I gather, just from your expression here, that you have reached a conclusion but you haven't put it down in exact words, and am I correct in that respect?

PRES: Yes.

[382] LO: So then it would be better for me to withdraw and then return when you can then tell me the exact words that the court at two-thirds majority has determined that would describe the nature of the act or acts that constitute the indecent, lewd and lascivious act. I gather from the nodding of the heads here that you have reached that point?

PRES: I think it's just a question of phrasing it so that you can use it, and again we can't give you the exact words.

LO: All right, sir, let me tell you then how you would start out on this: As the specification is preferred here, the word "sodomy," you tell me, he has been found not guilty of, that you are inserting "an indecent, lewd and lascivious act." So what you have done, you found him of the specification, guilty, except the word "sodomy" and, as you tell me, you desire to substitute for the word "sodomy" —"an indecent, lewd and lascivious act" with this boy. Now, if you recall from the previous instructions I indicated that if you did find him guilty of the lewd and lascivious act then, as a part of your exceptions and substitutions, would be the identity of the nature of the act constituting this lewd and lascivious act. Let me explain that just a little bit further . . . .

PRES: Yes?

LO: . . . . you have determined that the man committed an indecent, lewd and lascivious act with an individual, by ( ), and it is these words that you have to determine? For the record, the members are shaking their heads. I believe you have determined this much, but if you would tell me what they are then I will try to place them in the specification to complete it.

PRES: Do you want to withdraw?

LO: Yes. In order that you may more completely tell me the wording that two-thirds of the members agree to, the reporter and I will now withdraw. I think the record should clearly reflect that the court has, by two-thirds majority, reached its findings that the accused committed an indecent, lewd and lascivious act with Hodges. Now, am I correct in that?

[383] PRES: That's correct.

LO: All right. Sir, I will now withdraw, and if you will buzz me as soon as you are ready the reporter and I will return.

The court will be closed.

The court was closed at 1131, 13 September 1961.

The court was opened at 1139, 13 September 1961.

LO: Let the record show that the hour is now 1139, the same date. The law officer and reporter have returned to the closed session.

Captain, I would like to inquire now if you have reached a determination by two-thirds majority on the description of the nature of the indecent, lewd and lascivious act?

PRES: Right.

LO: Let the record show that the Captain has handed me the penciled notes, which read, ". . . by willfully and knowingly placing his head in the lap of the said H, (and I believe you meant Hodges), with his face in close proximity to the exposed penis of the said Hodges," am I correct there? And I will write in the word "Hodges" here (indicating) . . .

PRES: Yes, please.

LO: . . . since you have the blank. Now, would you like for me to write this out again in readable English for you?

PRES: Yes, put it down the way I am supposed to read it.

LO: Now, Captain, one final question: Has the court, by two-thirds majority, found the accused guilty of a different numbered charge?

PRES: We have not, knowing the number of the charge and which we understood you would advise us of the number. I understand you would advise us that it was 134.

LO: All right, sir. Well, now, may I read this to you, sir, to see if this conforms exactly with your finding: That you have found the accused ". . . of the specification of [384] the charge, guilty, except the word 'sodomy,' substituting therefor the words, 'an indecent, lewd and lascivious act,' and by adding at the end of the specification the words, 'by willfully and knowingly placing his head in the lap of the said Hodges with his face in close proximity to the exposed penis of the said Hodges;' of the excepted word, not guilty—that is, sodomy; of the substituted words, guilty; of the charge not guilty but guilty of a violation of Article 134, UCMJ."

PRES: Right.

LO: Now, that is your finding by two-thirds majority?

PRES: That is correct.

LO: Very well, sir.

PRES: Now, what do I read?

LO: In answer to your question, Captain, this might be one way (pointing) of doing it. Do it as you see fit. Do this first: Address the accused—"Commander Augenblick, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you: . . .

PRES: (Interjecting) And then this (pointing)?

LO: The part that I have written. If that is of assistance to you, you may use it; you may rewrite it yourself.

PRES: May I take a look at it?

LO: Yes, sir, you certainly may (handing).

PRES: I think I have it.

LO: All right, sir, is everyone clear on the wording here?

PRES: I would like to have them take a look at this to make sure. I think I heard you read it (handing to members).

LO: I just want to be sure that you clearly understood because it would be improper for me to suggest anything that you hadn't actually voted on.

[385] PRES: That's right.

MEMBER: It's still hard for me to understand. "Of the excepted words . . . .?"

LO: What it means is this: Now you have told me you find him guilty of a lewd and lascivious act so you have to substitute that word for sodomy; you find him not guilty of sodomy. When you except sodomy you find him not guilty of that word, you see? You find him guilty of the excepted words that you placed in there. Then you have added something at the end of the specification, and of those words you also find him guilty. Of the substituted words, guilty, because you have started out saying, "Of the specification, guilty, except . . ." So, you have found him guilty of what, sir? You have found him guilty of what you have added, but you except the part that you have taken out and found him not guilty of that.

Are there any further questions, Captain?

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[386] PRES: Commander Richard Gerard Augenblick, USN, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you of the specification of the charge, guilty, except the word "sodomy", substituting therefor the words, "an indecent, lewd and lascivious act", and by adding at the end of the specification the words, "by willfully and knowingly placing his head in the lap of the said Hodges with his face in close proximity to the exposed penis of the said Hodges," of the excepted word, not guilty; of the substituted words, guilty; of the charge not guilty but guilty of a violation of Article 134 of the Uniform Code of Military Justice.

* * * *

[17]

TRANSCRIPT OF PRE-TRIAL INVESTIGATION HELD

FEBRUARY 10, 1961

* * * *

[Witness: James O. Hodges]

Q. You stayed in separate rooms?
A. Yes.
Q. Who stayed in separate rooms?
A. Myself and the Commander.
Q. Was the Air Police who carried you from the Third Precinct to across the river, here?
A. Yes.
Q. Was that the headquarters of the Armed Service Police?
A. I believe it was. I do not know.
Q. And, how long did you remain in, or at the Armed Service Police Headquarters?
A. I believe until about 3:00 O'clock, or 4:00 O'clock.
Q. Did you recall what the time was when you got to the Third Precinct?
A. Where was that, civilian?
Q. The civilian police station?
A. About 1:30 or 2:00 O'clock.

Q. And, then you remained there until about what time? Was it there that you remained until 3:00?

A. No, we was there about a half an hour, then they turned us over the Air Police. Military Police.

Q. Now, do you say the Air Police or Military Police?

A. They were mixed.

Q. In what degree?

A. There was Navy Police and Air Force Police.

Q. Do you mean there was a Navy enlisted policemen?

A. Yes, sir.

Q. And an Army?

A. And an Air Force.

Q. Did they question you at all at the precinct?

A. No, they didn't.

Q. Did you go in separate cars or the same car to the Armed Services Police Headquarters?

[18] A. Separate.

Q. In which car did you go in? The Air Force or Shore Patrol?

A. They were both in the same car, and the Commander drove his car and followed us.

Q. You and the Commander was in the Commander's car following?

A. No. I was the police car and the Commander was following us in the Chevy.

Q. By himself?

A. Yes, sir.

Q. Were you questioned at all during that trip to the Armed Services Police Headquarters? Or to the civilian police headquarters?

A. No, I wasn't.

Q. You mean there was dead silence the whole way?

A. No. I think there was conversation, but I can't recall what it was.

Q. Did they—you had no recollection of what was said on that trip?

A. Most of the trip, they talked between themselves about their duties and about what they had been doing, nothing that involved me.

A. At no time did either one of the two Armed Services Police say anything to you?

A. I don't know what they said, or if they said anything. There was conversation between us, but very little.

Q. Did they say at some point, what kind of trouble have you got yourself into?

A. No, they didn't.

Q. How did you know that they didn't.

A. When they picked us up, I believe, the police officer related the—

Q. Do you believe, or do you know?

A. I don't know.

Q. You don't know?

A. No, I don't know.

Q. Now, about what time did you get to the Armed Services Police Headquarters?

A. It was around 2:00 O'clock, something like that.

[19] Q. How long did you stay there?

A. Until mid-morning sometime, 3:00 or 4:00 O'clock, I believe.

Q. Can you pin it down a little? You wear a wrist watch, don't you?

A. No. I don't. I have no time piece.

Q. Can you pin it down a little more for us as to whether it was closer to three or closer to four?

A. I can't say. I do not know. I wasn't aware of the time.

Q. How did you arrive at the time when you stated in your report as arriving at the White Tower at 0030 to 0100, and the Commander arriving at 0045?

A. I was watching the clock from the time I got off the bus.

Q. I see. Were there no time clocks in the Armed Services Police Headquarters?

A. I don't know. There was a clock above my head. I don't know what time it was though.

Q. You were getting sort of tired by this time, weren't you?

A. Yes.

Q. When was the last time that you had had anything to eat?

A. There at the White Tower. I had some broth and coffee.

Q. And, that was somewhere approaching one O'clock?
A. Yes, it was.
Q. What time had you gotten up that morning?
A. I believe I got up in the morning about 8:00 O'clock.
Q. Did you do any duty that morning at all?
A. No. I didn't.
Q. You had gotten the entire day off because of your birthday?
A. Yes. I didn't work. When I got up in the morning I went down stairs and made out the rest of my tool issue and took it over to the other side of the base, but I wasn't on official duty. I was just trying to pass time until evening.
Q. Now, what occurred next at the Armed Services Police Headquarters? You stated that you got there sometime around 2:00 O'clock. I believe earlier didn't you testified that you stayed at the civilian police station until around 2:00?

* * * *

IN THE UNITED STATES COURT OF CLAIMS

No. 357-64 (Decided May 12, 1967)

RICHARD G. AUGENBLICK

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON PLANTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

Our plaintiff is a career Navy commander, most recently on duty with the Department of Defense, who was dismissed from the service, with total forfeitures, by order of a Navy court-martial. Claiming that the conviction violated certain of his constitutional rights, he sues for back-pay and asks us to hold his dismissal invalid. The charge against him was sodomy with an enlisted airman, in violation of Article 125 of the Uniform Code of Military Justice, but the conviction was for the lesser included offense of committing an indecent, lewd, and lascivious act (under Article 134). The only sentence was dismissal and forfeiture of pay. Both sides have moved for summary judgment on the basis of the record in the military proceedings. We take the facts underlying the conviction as they were given by the Navy Board of Review in affirming the court-martial. Our problem concerns, not the weight or substantiality of the evidence, but alleged procedural defects said to constitute an invasion of the protection against double jeopardy and a denial of due process.

On January 11, 1961, Commander Augenblick after after having attended an office party where he had drinks of scotch with little water, proceeded to his home in Arlington, Virginia. Not feeling like turning in, he changed to civilian dress and went to a bar and an officers' club in Virginia before going to Washington where he also visited a bar. At each stop he had some beer. Becoming ex-

tremely tired and desiring a cup of coffee before returning home to Arlington, he entered a "White Tower" restaurant. While at the restaurant, he met Airman Hodges who was waiting for a bus which would return him to his base in nearby Maryland. It is not clear from the record who initiated the conversation, but it resulted in the accused's and the airman's taking a ride in the former's automobile. After driving about fifteen minutes, the accused parked the automobile in the vicinity of the West Potomac Basin in the District of Columbia, near the Potomac River, where they were apprehended by two Metropolitan Police Officers, taken to the Third Precinct, charged with disorderly conduct, and delivered over to military police.

The accused testified in his own behalf that he was driving toward the Fourteenth Street Bridge (over the Potomac River from the District of Columbia to Virginia); that he was very, very sleepy and felt that it was unsafe to drive and therefore stopped in the area mentioned and went to sleep; that the next thing he remembers is the glow from the flashlight of one of the arresting officers. Airman Hodges, who was in full military uniform at the time of the arrest, testified for the prosecution that Augenblick first informed him that he had his uncle's car and that they could go to his uncle's home for some rest; that refusing this offer, the airman went for a ride with the hope of being returned to his base. Hodges stated that, upon parking the automobile, the accused first reclined against his door; after a few minutes, he asked whether he could lay his head in Hodges' lap and after certain preliminaries the accused performed an act of oral sodomy. The arresting police officers testified that they noted the accused's head disappear from the driver's side of the vehicle and upon inspection found his face very close to the exposed privates of the airman. The court-martial found Augenblick not guilty of sodomy but guilty of committing an indecent lewd, and lascivious act by willfully and knowingly placing his head in Hodges' lap with his face in close proximity to the latter's exposed privates.

The sentence of dismissal and forfeiture was approved by the convening authority, and the Board of Review

(with one of its three members dissenting) affirmed. The Court of Military Appeals denied petitioner's request for review, and the Secretary of the Navy declined further review under Article 71 of the Uniform Code.

In this court plaintiff's claim is bottomed on two constitutional arguments. First, he asserts that his right not to be twice put in jeopardy was violated when his first court-martial was terminated and he was subsequently tried and convicted by a second court-martial. Second, he insists that rulings of the law officer at the trial and of the Board of Review, concerning the production of evidence relating to Hodges' early-morning interrogation at the Naval Weapons Plant in Washington, abridged his right to due process.

I

Here, as in prior back-pay cases involving court-martial proceedings, the defendant tells us that we have no jurisdiction to scrutinize the conviction. Rejecting a similar claim, we recently said that "our opinions have consistently stated or assumed that denial of significant constitutional rights would render the military conviction invalid, and permit this court to award back-pay." *Shaw* v. *United States*, 174 Ct. Cl. 899, 904, 357 F. 2d 949, 953 (1966). It is argued that this position disregards Article 76 of the Uniform Code (and its predecessor, Article 50 (h) of the 1948 Articles of War) providing that court-martial determinations "are final and conclusive" and "are binding upon all departments, *courts*, agencies, and officers of the United States * * *." (emphasis added).[1] The

[1] Article 76, 10 U.S.C. § 876 (1964), reads:

"*Finality of proceedings, findings, and sentences.* The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President."

legislative history demonstrates conclusively that this section, despite the breadth of its wording, was not intended to do away with review by habeas corpus (S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 35 (1949)), and the Supreme Court has twice held that military "finality" provisions of this type do not cut off review by habeas corpus. *Gusik* v. *Schilder*, 340 U.S. 128, 132-33 (1950); *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (opinion of Chief Justice Vinson).[2] Defendant takes strictly and literally this specific reference to habeas corpus and denies that any other type of collateral review is available. But it seems clear that habeas corpus was mentioned because it is the primary mode of relief for confined prisoners, who historically form the bulk of those attacking court-martial convictions. For persons like plaintiff who are not in jail, habeas corpus is no remedy at all, and other avenues have long been open to redress their wrongs. In *Gusik* v. *Schilder*, *supra*, 340 U.S. at 133 n. 3, the Court observed that "collateral attack of a judgment of a court-martial was early entertained", expressly citing civil actions for trespass, replevin, and assault, battery, and false imprisonment. During at least the past eighty years this court has entertained suits by military personnel claiming that their court-martial convictions were void. See, *e.g.*, *Runkle* v. *United States*, 122 U.S. 543 (1887); *Fletcher* v. *United States*, 26 Ct. Cl. 541 (1891), *rev'd on the merits*, 148 U.S. 84 (1893); *Swaim* v. *United States*, 28 Ct. Cl. 173, 217 (1893), *aff'd*, 165 U.S. 553 (1897). This form of collateral review was long ago established firmly—although in the earlier days, of course, "jurisdiction" was interpreted narrowly. As the concept of "jurisdiction" has expanded (see, *e.g.*, *Johnston* v. *Zerbst*, 304 U.S. 458

[2] There have been comparable Supreme Court rulings with respect to broad "finality" statutes in the selective service field (*Estep* v. *United States*, 327 U.S. 114, 119, 121-125 (1946)) as well as in immigration cases (*Heikkila* v. *Barber*, 345 U.S. 229, 233-35 (1953); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956)). See also *Wellman* v. *Whittier*, 259 F.2d 168 (C.A.D.C. 1958) and *Thompson* v. *Gleason*, 317 F.2d 901 (C.A.D.C. 1962) (interpreting 38 U.S.C. § 211(a), making final certain determinations of the Administrator of Veterans Affairs).

(1938)), this court has naturally kept pace. See *Shaw* v. *United States*, *supra*, 174 Ct. Cl. at 903-06, 357 F. 2d at 953-54. The wider power of review has only been exercised for the last generation. There has, however, been an unbroken continuity, going back to the 19th century, in the position that a void court-martial conviction can be attacked through a suit for back-pay in this court. In one of his opinions in *Burns* v. *Wilson*, 346 U.S. 137, 844, 847-48 (1953), Mr. Justice Frankfurter referred to the broadened concept of "jurisdiction" reflected in a series of then-recent court-martial cases in the Court of Claims with the significant observation, "where of course collateral attack is by way of a petition for back pay resting on allegations that the assailed court-martial proceedings were void."

There is no adequate reason for looking to habeas corpus alone, or for thinking that Congress limited its exception from "finality" to that specific proceeding. Liberty is of course important, but so are a man's career,[3] his livelihood, his rights as a veteran, his status as a convicted criminal, and his reputation. To deny collateral attack to one not in confinement—the consequence of saying that habeas corpus is the only remedy—would be to deny the possibility of review by a constitutional court, and ultimately by the Supreme Court, of the constitutional claims of servicemen like plaintiff who have not been sentenced to jail or who have been released. See *Gallagher* v. *Quinn*, 363 F. 2d 301, 303-04 (C.A.D.C. 1966), *cert. denied*, 385 U.S. 881. On these grounds, the District of Columbia Circuit recently upheld, in *Gallagher*, the right to seek a mandatory injunction and declaratory relief testing a court-martial conviction, and the First Circuit has sustained an action in the nature of mandamus to the same effect. *Ashe* v. *McNamara*, 355 F. 2d 277 (C.A. 1, 1965).[4]

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[3] Plaintiff had served over 18 years in the Navy at the time of his conviction, with combat service in World War II and the Korean episode, and important duty assignments; he had been selected for promotion to captain.

[4] The other day the District of Columbia Circuit entertained a declaratory judgment suit by an individual who had been con-

Within the last three years we have taken the same road in *Hooper* v. *United States*, 164 Ct. Cl. 151, 326 F. 2d 982 (1964), *cert. denied*, 377 U.S. 977, and in *Shaw* v. *United States*, *supra* (as well as in earlier decisions).

Defendant points out that here, unlike *Shaw* (see 174 Ct. Cl. at 905-06, 357 F. 2d at 954), the Court of Military Appeals could have reviewed the case, though it chose not to do so. On the pure question of this court's power to consider the "jurisdiction" of the court-martial, we do not think this makes any difference. The "finality" provision of the Uniform Code, as we have pointed out, does not make the military appellate court truly final. Appropriate review by Article III courts has continued. In *Hooper* v. *United States*, *supra*, the Court of Military Appeals had taken the plaintiff's case and passed upon the same issue presented to this court. In *Gallagher* v. *Quinn*, *supra*, as in the present case, the Court of Military Appeals denied the petition for review. In several habeas corpus cases the Supreme Court has considered issues which have been passed upon by the military court. *Reid* v. *Covert*, 354 U.S. 1 (1957); *Kinsella* v. *Singleton*, 361 U.S. 234 (1960); *McElroy* v. *Guagliardo*, 361 U.S. 281 (1960). These cases involved court-martial "jurisdiction" in the more traditional sense, but once it is admitted that this court (or a district court) still has power to consider that kind of "jurisdiction"—even after the establishment of the Court of Military Appeals—we do not see how it can be said that the civil court's *power* is restricted to old-fashioned "jurisdiction" and cannot extend to "jurisdiction" in the more modern sense of *Johnston* v. *Zerbst*, *supra*. It may well be that, where the Court of Military Appeals has actually passed upon factual issues, a civil court should not reweigh the evidence at all. But lesser deference may be thought due where the Court of Military Appeals, as here, has merely denied a petition for review, thus exercising the certiorari-type authority granted it by

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victed and fined by a court of the civil administration of Okinawa, from which no direct appeal can be taken to any Article III court. *Eiko Uehara Rose* v. *McNamara*, C.A.D.C. No. 20323, decided March 23, 1967.

Article 67(b)(3) of the Uniform Code.[5] *Cf. Fay* v. *Noia*, 372 U.S. 391, 435-38 (1963). In any event, the existence of the Court of Military Appeals does not preclude consideration by this court of constitutional issues other than those calling for a reassessment of particular evidence or particular circumstances. See *Shaw* v. *United States*, *supra*, 174 Ct. Cl. at 905, 357 F. 2d at 954.

It is for that reason that we cannot accept, in this case, the Government's further point that, since plaintiff was accorded consideration within the military system of the constitutional objections he now advances, this court should not reconsider those objections for itself. As will appear in our discussion of the merits (Parts II—V, *infra*), there is no occasion now (as there was not in *Shaw*) to consider whether or not the admonitions of *Burns* v. *Wilson*, 346 U.S. 137 (1953), have retained their full force since the recent developments in the law of federal review of state criminal convictions (*e.g.*, *Townsend* v. *Sain*, 372 U.S. 293 (1963)). To dispose of this case we need not reevaluate for ourselves evidence which the military has itself evaluated under a proper legal standard. We need not reexamine or reweigh pure issues of fact. The errors we find mount to a constitutional defect which grows directly from, and is entwined with, erroneous legal rulings by the law officer and the Board of Review. In that respect the requirement of *Burns* v. *Wilson*, *supra*, 346 U.S. at 142, 144, for full and fair consideration of the case by the military has not been fulfilled for this plaintiff.

II

The claim of double jeopardy rises from these facts:— Under court-martial procedures, if a witness is not available for examination during the required pre-trial investigation (under Article 32) it is prejudicial error for the

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[5] In the decisions in which we have referred to a denial of a petition for review by the Court of Military Appeals, we have also found, ourselves, no reason to think there was a jurisdictional defect (*Moses* v. *United States*, 137 Ct. Cl. 374, 379-80 (1957); *Begalke* v. *United States*, 148 Ct. Cl. 397, 402-03, 286 F. 2d 606, 609-10 (1960), *cert. denied*, 364 U.S. 865).

investigating officer to consider his unsworn statements. Failure to follow this procedure could subject subsequent findings by a court-martial to reversal on appeal. *United States* v. *Samuels*, 27 C.M.R. 280, 287 (1959). At plaintiff's pre-trial investigation, written documents purporting to be sworn statements of the two arresting police officers were introduced in the absence of those civilian officials who had refused to testify unless subpoenaed. Agent Mendelson, a civilian employee of the Office of Naval Intelligence (who took the statements), testified at the investigation that the statements had been sworn to (and therefore that the jurats were correct). The accused objected to the officers' evidence, claiming that he should have been permitted to confront and examine them. The investigating officer ruled otherwise, and on the basis of the allegedly sworn statements and the testimony of Airman Hodges recommended that Commander Augenblick be brought to trial before a general court-martial. At the first trial, the defense counsel renewed the objection to the appearance of the police officers and moved that the charge and specification be dismissed on the ground that their pre-trial statements had not been shown to be sworn, as required by the Code. During an interview with defense counsel and at an out-of-court hearing, one police officer categorically stated that he had not sworn to his written statement. Mendelson testified that he was not certain but felt that he had taken the officer's oath. Confronted with this conflicting testimony, the law officer, presiding at the trial, interpreted the defense motion to dismiss as one for appropriate relief and granted it. He also considered it within the province of the convening authority to determine what disposition should be made of this matter and what action should be taken on the charge and specification. The convening authority withdrew the charge and specification from the first court and initiated a Court of Inquiry which heard sworn testimony, including that of the police officers, and recommended a second court-martial. This second trial, before a new court, is said to have violated plaintiff's constitutional right to be free of double jeopardy.

The Fifth Amendment "does not mean that every time a defendant is put to trial before a competent tribunal he

is entitled to go free if the trial fails to end in a final judgment." *Wade* v. *Hunter*, 336 U.S. 684, 688 (1949); *Gori* v. *United States*, 367 U.S. 364, 368 (1961). Aware that unforeseeable circumstances may arise during a trial making its completion impossible, the Supreme Court has long applied the rule, first formulated in *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), that "a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Wade* v. *Hunter*, *supra*, 336 U.S. at 690. *Perez* and its progeny, instead of establishing a "rigid formula" capable of mechanical application, direct the courts to pay heed to all circumstances and to accept "the sound discretion of a presiding judge * * * as to the necessity of discontinuing a trial." *Id.* at 691, 692. This same standard applies, in general, to courts-martial. *Wade* v. *Hunter*, *supra*; *United States* v. *Stringer*, 17 C.M.R. 122, 132-33 (1954).

In this case, the law officer was confronted—when it was learned that the policeman had not in fact sworn to his pre-trial statement—with potential procedural error of sufficient gravity to vitiate an ultimate finding of guilty. *Cf. United States* v. *Schilling*, 22 C.M.R. 272, 274 (1957). The steps taken by him and the convening authority to cure this serious defect were well within the bounds of sound judgment. An error in the pre-trial investigation might possibly be cured by testimony received at the trial. See, *e.g.*, *United States* v. *Everett*, 16 C.M.R. 676 (1953). That was, however, not the only route. The course chosen was quite appropriate since the observations in the policeman's pre-trial statement had contributed to the investigating officer's recommendation that a court-martial be convened. In those circumstances it was important to determine if sufficient evidence existed, apart from the questionable statement, to bring the accused to trial. One method of obtaining this evidence would be to convene a Court of Inquiry which would have the authority (which the Article 32 pre-trial investigation lacked) to subpoena witnesses, including the policemen, hear testimony, and recommend any additional judicial proceedings.[*]

[*] We agree with the statement of the Board of Review that, "There were other means at the disposal of the law officer and the

Our conclusion is supported by the significant fact that in the first court-martial proceeding the accused apparently sought the very remedy provided by the convening authority—the establishment of a Court of Inquiry. In military procedure, a motion to dismiss is often treated as a motion for appropriate relief. See *United States* v. *Samuels, supra; United States* v. *Nichols*, 23 C.M.R. 343, 348 (1957); *United States* v. *Everett, supra.* Here, defense counsel did not object to the law officer's ruling converting the motion to dismiss into one for appropriate relief. On the contrary, counsel, by motions and argument, indicated that they sought the opportunity to interrogate the policeman at a Court of Inquiry, and pointedly declared that "very definitely we would ask for a court of inquiry." [7] The plaintiff cannot insist upon specific re-

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convening authority to clarify this issue and remedy the defect but we do not believe it is for us to be a 'Monday morning quarterback' in this particular instance since we see nothing here that would lead us to believe that the action taken by the law officer and the convening authority was for any purpose other than to cure a defect and assure the parties a fair and impartial trial."

[7] The record of the pre-trial investigation and the first court-martial reflects counsel's insistence. At the outset of the first Article 32 pre-trial investigation, the defense objected to proceeding in the absence of the two police officers who would not appear unless subpoenaed. Defense counsel stated, "There is a procedure in existence for securing their presence." During the first trial, counsel renewed this objection and moved that the charge and specification be dismissed, stating in part:

"Those policemen were readily available by processes of the Navy with which the Legal Officer was completely aware, namely that a Court of Inquiry, which would have subpoena power, could be employed * * *."

In further argument on the motion for dismissal, the defense counsel stated:

"I believe and I submit to the law officer, that I don't think I could have made it any clearer right at the every outset that we've not only objected, but without using the words 'Court of Inquiry' as such, which I say again, I don't think was necessary; the Investigating Officer, the Commander, the Legal Officer, he knew what I meant without using the touch stone, Court of Inquiry, but we were told that this is the proceedings, this is the way we are going to proceed and that's it."

Finally, in response to the law officer's question at the trial

dress before the court-martial and then complain because it was granted. See *United States* v. *Ivory*, 26 C.M.R. 296 (1958); *Leigh* v. *United States*, 329 F. 2d 883, 884 (C.A. D.C. 1964).

Nor is there adequate reason to believe that the convening authority terminated the proceedings and ordered the Court of Inquiry with the intention of obtaining the accused's conviction by a second court-martial after it had become evident that the first would acquit. The Board of Review (which was unanimous on the double jeopardy issue) found that evidence very damaging to the accused had already been received by the first court through Hodges' testimony. That trial, when terminated, was not going badly for the prosecution. See *Gori* v. *United States*, *supra*, 367 U.S. at 369. Indeed, there is evidence that the president and members of the first court-martial were "irritated" by the "administrative delays" (caused by the lengthy out-of-court hearings), and that the accused's counsel was concerned with the possibility that these irritations might affect the court's judgment adversely to the accused. If such prejudice were established, dismissal of the charge and specification and granting of a retrial would be the required procedure. *Wade* v. *Hunter*, *supra*, 336 U.S. at 689. This possibility could be taken into account in confirming the decision to terminate on other grounds.

The course taken by the law officer and the convening authority was an effort to assure the accused a fair and impartial trial. Confronted with serious procedural error and aware of the expressed desire of accused's counsel, the officials chose to end the first court-martial, convene a Court of Inquiry, and proceed to trial anew. There was no taint of an attempt to prejudice the accused. In the circumstances, we agree with the Board of Review that these measures did not violate the double jeopardy provision of the Constitution.

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whether the defense desired a further pre-trial investigation or a Court of Inquiry to be held to correct the alleged defects in the pre-trial investigation, the defense stated:

"Yes, sir. * * * The answer to the law officer's question is that very definitely we would ask for a court of inquiry. That was what we had meant by implication at the very beginning, sir."

III

The second of plaintiff's bases for invalidating his conviction and dismissal is that rulings of the law officer (at the second court-martial) and of the Board of Review violated the Jencks Act, 18 U.S.C. § 3500, and that in this case those errors rose to a deprivation of due process.

The challenged rulings involve the early-morning interrogation of Airman Hodges immediately after the arrest. At the civilian police station, both the commander and the airman denied that "anything" had happened. After being turned over to the Armed Services Police, they were brought to the headquarters of the Potomac River Naval Command at the Naval Weapons Plant in Washington for interrogation. It was then about three o'clock in the morning of January 12, 1961. The airman and the accused were questioned separately in a room designed for the monitoring and recording of conversation. Agent Connor of the Office of Special Investigation of the Air Force (OSI) interrogated Hodges, while Agent Mendelson, the civilian employee of the Office of Naval Intelligence (ONI), observed, asked some questions, and took notes. After twenty to twenty-five minutes Connor accompanied the twenty-year old Hodges to the separate Air Force OSI headquarters in Maryland where Hodges swore to a five-page written statement describing the evening's events. After the Hodges session at the naval station, Mendelson interrogated the accused for about two hours. During both interviews at the naval station, Agent James, the duty officer at that post, was in the adjacent room. He testified unequivocally that he had made tape recordings of both sessions—one reel of the Hodges and two reels of the Augenblick interrogation.

At the second court-martial, Hodges' testimony touched on his interrogation at the Naval Weapons Plant. After trial counsel's direct examination, the defense moved, pursuant to the Jencks Act, for production of the tape recording transcribed by Agent James and for the handwritten notes taken by Agent Mendelson during the interrogation. The law officer ordered either that the tape-recording be produced or that the Government produce witnesses at an out-of-court hearing who "can explain" its non-existence if the tape were not available, but refused to order

production of Mendelson's notes.[8] The Government did not produce the Hodges tape-recording, but called as witnesses each of the intelligence officers who had contact with the recording, except Agent Mendelson who was in Norfolk at the time of the second trial in Washington. The upshot of the testimony was that, though James testified that he had made the tape, no one than had it or had heard it or knew what had happened to it. The defense urged the calling of Mendelson, but the law officer, after reading the record of Mendelson's testimony on the tape-recording at a pre-trial investigation, refused to have him called as a witness and concluded that no sanction should be imposed on the prosecution for failing to produce the recording. The Board of Review (with a dissent on this point) affirmed, holding, among other things, that "It was the responsibility of counsel for defendants, [sic] to pursue ascertainment of correctness of the Government's claim that the tape recording which was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government."

A. We discuss first the application of the Jencks Act to the tape-recording, then, to the handwritten notes (Part IV, *infra*), and finally, in Part V, *infra*, whether the circumstances here raise the statutory violations to the constitutional level. The Act provides that, after a Government witness has testified on direct examination, at a criminal trial, "the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). Paragraph (d) declares:

> If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in

[8] The prosecution had proffered Hodges' written statement made later at Air Force headquarters, but the defense had declined the offer.

its discretion shall determine that the interests of justice require that a mistrial be declared.

The Hodges tape-recording would plainly qualify as a productible statement under paragraph (e).[9] There is no doubt, moreover, that the Jencks Act governed plaintiff's trial. See *United States* v. *Combs*, 28 C.M.R. 866 (1959); *United States* v. *Heinel*, 26 C.M.R. 39 (1958). The rights protected by both the Supreme Court's *Jencks* decision, 353 U.S. 657 (1957), and the congressional Act are considered by the military as "a basic protection to which an accused is entitled." Kent, "The Jencks Case: The Viewpoint of a Military Lawyer," 45 A.B.A.J. 819 (1959), citing Dep't of Army Pamphlet 145-1 at p. 37. In this case, the Government has accepted the applicability of the Jencks Act to proceedings of military tribunals and has confined its argument to denying any statutory violation or invasion of constitutional rights.

Three other undisputed postulates of the Act's application may also be stated at the outset. First, a "statement" need not be within the physical control of the prosecution to be "in the possession of the United States." It is sufficient that an investigating Government official has possession. The original *Jencks* decision *supra*, 353 U.S. at 659, 673, as well as the majority of its offspring, have involved the production of reports from the files of the FBI. *Cf. Harvey Alum. (Inc.)* v. *NLRB*, 335 F. 2d 749, 753-54 (C.A. 9, 1964) (statements held by government agency other than the one conducting a hearing producible under Jencks Act at the hearing). Even in non-Jencks Act evidence-suppression cases, the activities of investigating officials are generally attributeed to the prosecution. See

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[9] 18 U.S.C. § 3500(e) provides:

"The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Barbee v. *Warden*, 331 F. 2d 842, 846 (C.A. 4, 1964); *Curran* v. *State of Delaware*, 154 F. Supp. 27, 31 (D. Del. 1957, *aff'd*, 259 F. 2d 707 (C.A. 3, 1958), *cert. denied*, 358 U.S. 948 (1959). Possession of the tape recording by a Government official such as an ONI or OSI intelligence officer would thus fall within the statutory requirement. Equally evident, destruction of a statement, in certain circumstances, would be the equivalent of non-production under section 3500(d). *Campbell* v. *United States*, 365 U.S. 85, 98 (1961); *Killian* v. *United States*, 368 U.S. 231, 242 (1961). Restricting "possession" to physical control at the time of trial would "permit evasion and emasculation of the Jencks Act to the point of total ineffectiveness." *United States* v. *Lonardo*, 350 F. 2d at 523, 530 (C.A. 6, 1965). Third, the test to determine in what circumstances a Government official may destroy a Jencks Act "statement" without violating the statute turns on the good-faith and reasonable nature of the destruction. For instance, an FBI agent takes notes of an interview with a Government witness, and, after transferring the information in the notes to a formal report, destroys the former. Assuming the notes to be a statement, the Supreme Court has indicated that the critical inquiry would be whether the statement was "destroyed by the agents in good faith and in accord with their normal practice * * *." *Killian* v. *United States*, *supra*, 368 U.S. at 242.[10] The federal courts have carefully examined the particular facts of each case in reaching this judgment. See *United States* v. *Jones*, 360 F. 2d 92, 95 (C.A. 2, 1966), *cert. denied*, 385 U.S. 1012 (1967); *United States* v. *Greco*, 298 F. 2d 247, 250 (C.A. 2, 1962), *cert. denied*, 369 U.S. 820, and the other cases cited *infra*.

B. A crucial and contested issue in this case is whether the Government must demonstrate compliance with the good-faith test or whether the accused must show noncompliance (*i.e.*, bad faith or willful destruction). This is-

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[10] In *Campbell* v. *United States*, *supra*, 365 U.S. at 98, the Court left open the further question whether mere negligent destruction (or even non-negligent good-faith destruction) would be enough to invoke the Act's sanctions against the Government. See footnote 14, *infra*.

sue has rarely been discussed directly but we think that the cases indicate that the responsibility rests predominantly on the Government to prove that an unavailable statement was destroyed or misplaced in good faith, once the accused has made a showing that there is a sufficient basis for inquiry.[11]

At plaintiff's trial there was clearly enough of a showing to call for a further inquiry into the then existence of the Hodges tape-recording—the pre-trial testimony of Agent James that he had made such a tape would be sufficient in itself, and there were other troubling circumstances. The law officer obviously felt that plaintiff had borne any burden of coming forward; he ordered an out-of-court inquiry. Once that stage was reached, the standard advanced by the Supreme Court in *Killian*, *supra*—whether the statement was "destroyed by the agents in good faith and in accord with their normal practice * * *" —suggests that the Government must convince the judge of these facts. The references in *Campbell* v. *United States*, *supra*, 365 U.S. at 95, to a Jencks Act inquiry not being "an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion" was not intended to remove from the Government the risk of failing to persuade that it acted in good faith; rather, the Court was cautioning against imposing such burdens on the accused.

The federal courts seem to have applied the rule in this fashion. In *Ogden* v. *United States*, 303 F. 2d 724, 737-38 (C.A. 9, 1962), the court stated that during a Jencks Act inquiry the judge should consider evidence bearing on the issues "if the statement was destroyed in accordance with normal practice before the prosecution of defendant was completed, for a sufficient reason wholly unrelated to the prosecution, in good faith and with no intention to suppress evidence," and these facts are "peculiarly within the knowledge of the government, and it was improper to

[11] On the accused's burden of going forward, see *United States* v. *Comulada*, 340 F. 2d 449, 451 (C.A. 2, 1965), *cert. denied*, 380 U.S. 978; *Alexander* v. *United States*, 336 F. 2d 910, 911-12 (C.A.D.C., 1964), *cert. denied*, 379 U.S. 935.

impose the burden of a more precise demonstration upon the defendant." See also *United States* v. *Hilbrich*, 232 F. Supp. 111, 115, 130 (N.D. Ill. 1964), *aff'd* 341 F. 2d 555 (C.A. 7, 1965), *cert. denied*, 381 U.S. 941 (Government introduced evidence to show that statement destroyed in accordance with FBI procedures, good business and office practice. In judging the Government's good faith, the most important evidence "is the testimony of the witness who caused the destruction—his character and his apparent motives."); *United States* v. *Crosby*, 294 F. 2d 928, 950-51 (C.A. 2, 1961), *cert. denied sub nom. Mittelman* v. *United States*, 368 U.S. 984 (1962) (finding of good-faith destruction made after Government prosecutors who had destroyed certain notes testified); *United States* v. *Tomaiolo*, 317 F. 2d 324, 327-28 (C.A. 2, 1963), *cert. denied*, 375 U.S. 856 (finding of good-faith destruction made after Government showed that notes were destroyed prior to the passage of the Jencks Act and the identical information was available by other Government-furnished statements); *United States* v. *Thomas*, 282 F. 2d 191, 193-94 (C.A. 2, 1960) (good-faith destruction found after detailed explanation of government procedure regarding the preparation of written reports from destroyed notes); *United States* v. *Lonardo*, *supra*, 350 F. 2d at 529-30, 535 (Government unable to demonstrate good-faith destruction; statutory sanctions invoked although the defense apparently had not affirmatively shown any governmental intention to suppress information).[12] When a demonstra-

[12] Chief Judge Woodbury of the First Circuit has stated, while not affirmatively holding, what might possibly be interpreted as a contrary rule. On a petition for rehearing in the *Campbell* case, it was said that Jencks Act imposes "no duty, at least in the absence of bad faith, to keep any statements that might have been taken. Therefore, there being no evidence from which it could possibly be found that Toomey [the Government agent] destroyed his notes in bad faith, the question propounded by this petition * * * is academic." *Campbell* v. *United States*, 303 F. 2d 747, 751 (1962). We think that this statement only places the burden on the accused, to show official bad faith, after the Government has proffered evidence demonstrating that the "destruction was in entire good faith". This is consistent with both the concurring judge's interpretation of the court's denial, *id.* at 752, and the court's earlier disposition of the same case. 296 F. 2d 527, 534 (1961).

tion of good-faith behavior is affirmatively made by the Government, the accused would be called upon to rebut this evidence if he wished to prevail. See *United States* v. *Greco, supra*, 298 F. 2d at 250.

Placing the burden on the Government is just and appropriate. "[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Campbell* v. *United States, supra*, 365 U.S. at 96; *United States* v. *New York, N.H. & H. R.R.*, 355 U.S. 253, 256 n. 5. On the other hand, to put this burden on the Government would not cause unfairness or hardship. *Tot* v. *United States*, 319 U.S. 463, 469-70 (1943); *Shaw* v. *United States, supra*, 174 Ct. Cl. at 916, 357 F. 2d at 960-61. Facts bearing on the issue, such as the agents' conduct, office operating procedure, the existence of other evidence which might provide the accused with the information contained in the missing statement, are all "peculiarly within the knowledge of the government * * *." *Ogden* v. *United States, supra*, 303 F. 2d at 737.

We hold, therefore, that the Board of Review erred as a matter of law in ruling that "it was the responsibility of counsel for defendants, [sic] to pursue ascertainment of correctness of the Government's claim that the tape recording which was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government." [13] That holding improperly placed the burden of persuasion on the accused.

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[13] The Board majority also indicated by its phrasing that it was putting the burden on the accused when it said, in the paragraph immediately preceding the portion quoted above in the text, "nor is there any evidence of destruction or bad faith, or deliberate refusal to produce, as suggested by appellant in his supplemental brief," and "All of the witnesses were under oath and we cannot without substantial evidence to the contrary, hold that there was a deliberate refusal to deliver the tape or that these government employees were guilty of gross negligence of a degree requiring corrective action on our part." If the tape was improperly destroyed, Mendelson probably did it, but the Board merely says there was no evidence to that effect. That position reverses the burden. The Government should have been required to prove that Mendelson did not destroy the record.

C. This erroneous ruling directly infected, in our view, the Board's affirmance of the law officer's refusal to order Agent Mendelson called to testify at the production hearing held during the second trial. The law officer reasoned that Mendelson need not be called since he had testified during a pre-trial investigation (the "Peltzer investigation"), the defense had an opportunity to cross-examine him at that time, and Mendelson was then in Norfolk and a trip to Washington would have caused delay. The law officer read the relevant portions of the "Peltzer investigation" transcript and concluded that further testimony by Mendelson would not shed additional light on the disposition of the missing recording.

We know, of course, that evidentiary rulings are generally within the province of the trier and a judge or law officer's judgment should not be altered unless it is clearly erroneous. *Palermo* v. *United States*, 360 U.S. 343, 353 (1959). But the main basis for this rule, that the trial judge has had the opportunity to weigh the credibility of live testimony presented before him, is absent in this case —the fact that Mendelson did not appear before the law officer is the critical point. See *United States* v. *Aviles*, 337 F. 2d 552, 556 (C.A. 2, 1964). Moreover, this rule cannot and has not deterred courts from reviewing and reversing decisions which contravene substantial rights. See *Jencks* v. *United States*, *supra*, 353 U.S. 657; *Campbell v. United States*, 373 U.S. 487 (1963). We think that such an error is present here.

In Jencks Act matters the judge (and the law officer at a court-martial) has a special responsibility, and is not merely a passive arbiter of the parties' contentions. The Supreme Court stated in *Campbell I*, *supra*, that the judge's duty at a hearing is "affirmatively to administer the statute in such way as can best secure relevant and available evidence * * *." 365 U.S. at 95. The hearing is not a strictly adversary proceeding. The Court indicated, for example, that the trial judge might be required to call a witness on his own motion or require the Government to produce a witness to clarify uncertainties. The aim is to insure that the judicial officer is able to obtain sufficient information to determine whether the conditions of the Jencks Act have been fulfilled. See *Saun-*

ders v. *United States*, 316 F. 2d 346, 349 (C.A.D.C., 1963); *Hillard* v. *United States*, 317 F. 2d 150, 151, (C.A.D.C., 1963); *Ogden* v. *United States*, 323 F. 2d 818, 821 (C.A. 9, 1963), *cert. denied*, 376 U.S. 973 (1964).

In the light of the judicial officer's special responsibility, the mere reading of Agent Mendelson's prior testimony cannot, in the circumstances of this case, be accepted as sufficient. The cold print of a transcript is not as revealing as the opportunity to see, hear, and question a witness, and thus better judge his credibility. The law officer's inquiry was limited to the issues raised and the responses given at another investigation. He was denied the opportunity to raise new questions, press additional contentions, or reflect upon the witness' behavior or demeanor. Such advantages of oral testimony over the reading of a transcript caused the First Circuit to send a Jencks Act case back to the trial judge, ordering him to take oral testimony of a key government agent. *Campbell* v. *United States*, *supra*, 296 F. 2d at 534. See also, *Campbell* v. *United States*, *supra*, 365 U.S. at 96; *Campbell* v. *United States*, *supra*, 373 U.S. at 493. In the present instance, the witness' (Mendelson's) credibility was of obvious importance. It had already been placed in question by Mendelson's testimony that he had taken a sworn statement, with a jurat affixed, from Police Officer Round (one of two civilian policemen who had made the arrest); Round denied under oath that he ever swore to the statement; and the subsequent testimony of both policemen was "somewhat weaker" than their purportedly sworn statements.

In addition, Mendelson's testimony during the "Peltzer investigation" was far from informative on the two issues of importance at the out-of-court hearing during the second court-martial. First, when asked whether Hodges' interrogation had been recorded, the agent replied, "I'm not certain that we had any recording." Second, regarding the whereabouts of a tape if one had been made, he said: "I don't recall receiving a tape with Hodges' recording on it." He also offered the explanation that if he had received such a tape, "when the statement from Hodges came in, the tape was reused for another investigation."

Other testimony received during the pre-trial investigations and at the out-of-court hearing in the second court-martial clarified several issues and also raised serious questions regarding Mendelson's answers. Agent James unequivocably stated that he had made a recording (one reel) of the Hodges interrogation and had delivered that reel, with two others of Commander Augenblick's interrogation, to Agent Fason, Mendelson's superior. Mendelson's answer on the making of a tape was thus flatly contradicted by the person most likely to know. The helpfulness of Mendelson's initial statements on the disposition of the recording was also placed in grave doubt. Fason had originally testified that he had not received the reels from James. After Mendelson's appearance at the "Peltzer investigation", however, Fason altered his testimony and remember receiving boxes of tapes from James and physically handing the boxes (with a rubber band around them) to Mendelson on January 12, 1961. This change of testimony, after Mendelson's testimony, might have reawakened thoughts in Mendelson if he had been called again. Furthermore, testimony received after the "Peltzer inquiry" from other ONI agents revealed that, in June or July, when Mendelson was transferred to Norfolk, he delivered four boxes of tapes (without a rubber band) to Agent Carroll, who testified that Mendelson had stated "they were the tapes of Commander Augenblick's * * * interrogation." The four boxes were subsequently placed in storage. It thus became more apparent that, while the Hodges tape was in Mendelson's control (as it apparently was), it disappeared since it was not among the four tapes handed to Agent Carroll. It is also evident that two extraneous tapes, not pertinent at all to the Augenblick investigation, were added to the two reels of the accused's interrogation.

Next, during the out-of-court hearing at the second court-martial, it was known that the Hodges tape could not have been reused pursuant to normal ONI procedures. These procedures place the responsibility on the officer in charge of the case (Mendelson) and his superior (Fason), jointly, to decide whether a tape should be reused. But Mendelson, himself, had testified earlier that he did not

recall advising Fason that the tape was no longer needed; and Fason said that, after transferring the tapes to Mendelson, he had nothing further to do with them. It would have abridged normal ONI operating practice to have erased the tape, knowing that it might be needed as evidence at a future court-martial. Lastly, Agent James revealed that, even if a tape were erased, the number which he initially affixed to the reel (and also entered in his recording log) would not have been removed. Therefore, even if the Hodges recording had been erased, the ONI still should have produced, and been able to produce, the properly numbered reel.

Each of these points raised new and important areas of investigation which could have been pursued if Mendelson had been called as a witness at the out-of-court inquiry during the second court-martial. It was evident, we stress, from his earlier testimony that Mendelson was not a witness whose prior statements could be accepted at face value. Other testimony indicated, also, that he was best positioned to inform the court of the disposition of the tape-recording. It had been directly traced into his hands by the evidence of James and Fason. As the agent who apparently had physical control of the tape during the period in which it disappeared, his testimony was very important to the Government in meeting its burden of good-faith destruction or loss. See *United States* v. *Annunziato*, 293 F. 2d 373, 381 (C.A. 2, 1961), *cert. denied*, 368 U.S. 919; *Alexander* v. *United States*, 336 F. 2d 910, 912 (C.A.D.C. 1964), *cert. denied*, 379 U.S. 935; *United States* v. *Hilbrich*, *supra*, 232 F. Supp. at 130.[14] We

[14] One military tribunal appears to have held the prosecution to perhaps an even more stringent standard of conduct than the civilian courts. In *United States* v. *Combs*, 28 C.M.R. 866 (1959), Government negligence, rather than "'conscious' destruction", resulted in the loss of a Jencks Act statement requested by defense counsel. The Air Force Board of Review held that "we cannot allow the intent of that law [Jencks statute] to be circumvented by such negligence." Acknowledging that both the *Jencks* decision and statute "were aimed at preserving and perfecting the accused's rights to cross examination of prosecution witnesses on the basis of certain prior statements * * *", the Board imposed a duty upon the Government to preserve any statements until, at least, after it has

must therefore agree with the dissenting member of the Board of Review that failure to recall Mendelson for testimony bearing on these most important issues was error which substantially prejudiced the accused's rights.

IV

The plaintiff also argues that the law officer erred in not making an *in camera* examination of Mendelson's handwritten notes of the Hodges early-morning interrogation at the Naval Weapons Plant. Under the Jencks statute, the Government is required to produce only those written statements of a witness which are a "substantially verbatim recital" of the witness' oral statement. See footnote 9, *supra*. For the notes to qualify as a statement, the court must ask whether they "could fairly be deemed to reflect fully and without distortion what had been said to the government agent." "[O]nly those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." *Palermo* v. *United States*, *supra*, 360 U.S. at 352-53.

When an accused seeks production of a paper said to be a "statement", the trial judge, or law officer at a court-martial, must once again exercise his affirmative duty in discharging his responsibilities under the Act. *Campbell* v. *United States*, *supra*, 365 U.S. at 95. The entire Court in *Campbell* recognized this duty when "the legal significance of a document" is at issue. "Here the responsibility for resolving the issue rests with the court, and it is the court that must pursue appropriate means for ascertaining the facts relevant to judgment." *Id.* at 107. The primary obligation is placed upon the court.

The "appropriate means" can vary with each case. Documents "clearly beyond the reach of the statute" perhaps need not be produced. "However, when it is doubtful whether the production of a particular statement is compelled by the statute," the Government, at a minimum, must submit the statement to the trial judge for an *in*

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been determined whether their production will be required at trial. *Id.* at 878. In *Campbell I*, *supra*, 365 U.S. at 98, the Supreme Court left open the question of destruction or loss which was in good faith but merely negligent.

camera determination. *Palermo* v. *United States*, *supra*, 360 U.S. at 354. Often, the circumstances require a *voir dire* inquiry at which the judge takes testimony and hears argument of counsel relating to the statement. *Campbell* v. *United States*, *supra*, 365 U.S. at 92; *Palermo* v. *United States*, *supra*, 360 U.S. at 354-55.

While the decisions of other courts in other factual circumstances cannot serve as binding precedent to resolve the particular issue we have, it is relevant that the courts have been very reluctant to decide whether a document qualifies as a statement without, at least, holding an *in camera* examination of the document. *Palermo*, itself, concluded that an agent's notes, consisting of approximately 600 words, of a conference lasting three and one-half hours was not a Jencks Act "statement" only after the disputed notes were examined by the trial judge. See, *e.g.*, *United States* v. *Keig*, 320 F. 2d 634, 637 (C.A. 7, 1963); *Karp* v. *United States*, 277 F. 2d 843, 849 (C.A. 8, 1960), *cert. denied*, 364 U.S. 842; *Williams* v. *United States*, 328 F. 2d 178, 180 (C.A D.C., 1963); *Bary* v. *United States*, 292 F. 2d 53, 58 (C.A. 10, 1961). These and companion decisions, to paraphrase Justice Frankfurter, seem to us to establish "a generally clear direction" that, where there is doubt, *in camera* inspection must be had. *Palermo* v. *United States*, *supra*, 360 U.S. at 353.[15]

The law officer and the Board of Review did not find that there was no doubt that Mendelson's handwritten notes were not producible; they simply determined, without looking at the notes, that for various reasons they must be considered non-producible. But in the absence of the notes it could not be said, without much doubt and hesitation, that they failed to qualify as a "statement." In denying the accused's motion for production of the

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[15] In only one decision which has come to our attention has a circuit court affirmed the trial judge's refusal to hold an *in camera* examination of a memorandum to determine its status under the Jencks Act. *Canaday* v. *United States*, 354 F. 2d 849, 859 (C.A. 8, 1966). That court stressed the Government agent's undisputed testimony that the memorandum was drafted from information contained in documents which were given to the defense, and that no prejudice resulted from the judge's action.

notes, the law officer relied "particularly" on the fact that the agent used "navy terminology." Agent Mendelson's testimony at the "Peltzer investigation," however, reveals that such jargon was included in a typed memo report subsequently prepared, but apparently not in the notes. The law officer seems to have confused the notes with the typed memorandum subsequently prepared by the agent. Furthermore, the initial evidence concerning the notes was only Mendelson's comment that "I did jot down a couple of rough notes at the time." Subsequently, Mendelson informed the trial counsel that "he never had any" notes of the Hodges interrogation. Once again, Agent Mendelson's initial statement became engulfed in a shroud of mystery and doubt, solely of his own creation. In addition, the Board of Review rested in part on its factually erroneous statement (twice repeated) that accused's counsel did not ask for the notes at the pre-trial proceedings.

In these circumstances, we think it was erroneous for the Board to affirm the law officer's failure to examine *in camera* Mendelson's notes of the Hodges interrogation so as to determine if they qualified as a "statement" and were producible under the Jencks Act. Such an *in camera* judicial examination would accord with the Act's purpose to regulate the defense's access to government papers. *Palermo* v. *United States*, *supra*, 360 U.S. at 354. The mere examination would not have delayed the trial or caused excessive inconvenience. *United States* v. *Comulada*, 340 F. 2d 449, 451 (C.A. 2, 1965), *cert. denied*, 380 U.S. 978. It would have assured, however, that the accused's right to important material was adequately safeguarded.[16]

For these reasons (Part III and IV, *supra*), we hold that the plaintiff's court-martial was tainted with two separate violations of the Jencks Act. In so ruling we are not reweighing and reexamining the evidence for ourselves (see *Burns* v. *Wilson*, *supra*, 346 U.S. at 144) but are determining that the law officer and the Board of

[16] If the notes were not produced, the law officer could have inquired whether they had ever been made and, if so, had been improperly destroyed or lost. See *Campbell* v. *United States*, *supra*, 365 U.S. at 94, 98; *Ogden* v. *United States*, *supra*, 303 F. 2d at 733 (C.A. 9, 1962).

Review committed serious legal errors—placing the burden of persuasion on the accused and otherwise misinterpreting the requirements of the Act—which deprived plaintiff of the "fair consideration" and the "full and fair hearing" which were his prerogatives (*id.* at 142, 144). The question remains whether these legal errors so prejudiced his trial that we should conclude that his constitutional right to due process has been violated.

V

Every violation of the protections afforded by the Jencks Act does not, in and of itself, amount *ipso facto* to a violation of the Due Process Clause. See *Scales* v. *United States*, 367 U.S. 203, 257-58 (1961). The Act's requirements, for instance, have not been applied as such to state criminal convictions. But we must explore the special circumstances of the case to determine if the statutory violations so fatally infected the court-martial proceedings against plaintiff that he was unconstitutionally deprived of a fair trial. That can surely be the result of significant procedural errors like these. The Supreme Court has indicated that the demands of the Due Process Clause must be carefully weighed when an accused in a criminal trial seeks evidence within the prosecution's control which is important to his defense. See *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *United States* v. *Reynolds*, 345 U.S. 1, 6 (1953); *United States ex rel Touhy* v. *Ragen*, 340 U.S. 462, 469 (1961). This constitutional inquiry is integral to our system under which the Government which prosecutes an accused also shares the responsibiilty of assuring that justice is done. *Jencks* v. *United States*, *supra*, 353 U.S. at 671.

The *Jencks* decision recognized that "justice requires" that a defendant at a criminal trial obtain prior statements of a witness which relate to his testimony. *Id.* at 669. Discussing the basis of the Court's decision, Mr. Justice Brennan has said: "It is true that our holding in *Jencks* was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; indeed, the Congress recognized its constitu-

tional overtones in the debates on the [Jencks] statute." *Palermo* v. *United States*, *supra*, 360 U.S. at 362-63 (concurring opinion). A sponsor of the Jencks legislation explained, "The purpose of the bill is to protect the files of the Government against unwarranted disclosure and at the same time to preserve due process of law for defendants in criminal cases." 103 Cong. Rec. 16487 (Sen. O'Mahoney); *Clancy* v. *United States*, 365 U.S. 312, 315 (1961); *Campbell* v. *United States*, *supra*, 365 U.S. at 92. See also *Communist Party* v. *Subversive Activities Control Board*, 254 F. 2d 314, 327, 328 (C.A.D.C., 1958); 103 Cong. Rec. 15933-34, 15928, 16488-89, 16738 (1957).

A combination of factors leads us to conclude that, in this case, the Jencks Act violations were so weighty that they cumulated to the denial of a minimally fair trial. The first is that Hodges was the all-important prosecution witness. Without his testimony it seems unlikely that the court-martial would have convicted, even of the lesser offense. If the tape-recording had been improperly lost or destroyed, his entire testimony would have been stricken (under 18 U.S.C. § 3500(d) and the prosecution would have been left with little. Yet the evidence available to the law officer indicated a good chance that the tape, traced to Mendelson, had been improperly destroyed or lost by him. It was therefore critical to the trial that the tribunal go as far as could be to inquire into that possibility.

If the recording had been produced as a result of further examination of Mendelson, the information it contained could have been most revealing. Hodges was twenty years old and a low-ranking enlisted man. At first he denied that "anything happened." What he said thereafter at his first interrogation in the early morning at the Naval Weapons Plant, what questions he answered, how he was interrogated, would clearly have a significant bearing on the reliability of the statement thereafter written up at Air Force headquarters and on the credibility of his testimony at the trial. The dissenting member of the Board of Review detailed the importance to the accused of this "initial interview of Hodges, a twenty year old, frightened enlisted man, being interviewed by two agents,

with a third monitoring, in the early hours of the morning, especially since there are some indications in the record that at the very outset Hodges denied that 'anything' happened." Since Hodges during the trial apparently expected to receive an honorable discharge, and subsequent to the plaintiff's conviction was in fact honorably discharged from the Service, it was also very relevant for the accused to ascertain whether any inducement was offered or suggested, or other improper dealings had, during this first interrogation session.

Moreover, Hodges must have been a very dubious witness. His veracity was obviously questioned by the members of the court-martial. Of the prosecution's three principal witnesses, only Hodges testified that the accused had committed an act of oral sodomy. Significantly, plaintiff was acquitted of the charge of sodomy, and convicted only of committing an indecent, lewd, and lascivious act (wilfully and knowingly placing his head in the airman's lap with his face in close proximity to the latter's exposed privates). The testimony of the civilian police officers, that they observed the accused's head in the vicinity of Hodges' exposed privates, is not necessarily inconsistent with the accused's defense that he was very sleepy and fell asleep. There was testimony that Augenblick was prone to cat-naps. Obviously, statements made at the Naval Weapons Plant interrogation could have been of great significance in the cross-examination of Hodges.

The content of this first interrogation assumes even great importance given the nature of the accusation and the background of the accused. Like other sex crimes, the accusation here, the heinous crime of sodomy, is not difficult to utter but arduous to defend against. It is not unknown for such charges to be concocted by frightened, psychologically disturbed, perverted, or greedy individuals. Testimony revealed that, so far as was known, this accused never previously acted in the manner charged and has been and continues to be held in the highest esteem by his fellow officers. But such evidence can be insufficient in the face of direct and explicit accusations of unnatural conduct. It is here that knowledge of the early morning interrogation of Hodges could have been specially import-

ant to the defense in the court-martial. *Cf. Kyle* v. *United States*, 297 F. 2d 507, 512 (C.A. 2, 1961). It is no matter that the information would bear on the main witness' credibility rather than directly on the accused's guilt. Indeed, the court-martial panel's "estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence * * *" *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *Giles* v. *Maryland*, 35 U.S.L. Week 4181, 4183, 4191 (U.S. Feb. 20, 1967); *People* v. *Savvides*, 1 N.Y. 2d 554, 557; 136 N.E. 2d 853, 854-55, 154 N.Y.S. 2d 885, 887 (1956).[17]

If the accused were able to discover what had transpired at the interrogation through other means, the prejudicial effect of the Jencks Act violations would have been lessened. See *Rosenberg* v. *United States*, 360 U.S. 367, 370-71 (1959). The defense did have the opportunity to question Hodges on the interrogation. This, however, could not serve as an adequate substitute for being able to ascertain what the witness had actually said (and what was said to him by the inquiring officers) shortly after his arrest. Plainly, the effectiveness of the trial cross-examination was curtailed by the defense's inability to gain access to the witness' prior statements. Nor was Hodges' five-page statement prepared later at Air Force (OSI) headquarters in Suitland, Maryland, a sufficient replacement. That paper, written in the presence and with the assistance of an OSI agent, was compiled several hours after the initial interrogation. It did not shed any light on the conduct or statements of the participants at the earlier Naval Weapons Plant interrogation.

Of course, it may have been that the tape-recording or Mendelson's notes would not have proved helpful to the accused, or that they may have been shown (if Mendelson had been called to testify) to have been lost or destroyed in good faith and without fault, or that they may have been proved never to have existed at all, or that the notes would turn out not to be producible under the Jencks Act. But, in view of the critical importance of Hodges' testi-

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[17] These comments are all applicable, with lesser force, to Mendelson's hand-written notes (if they proved to be producible).

mony and of his interrogation at the naval station, plaintiff was strongly entitled to have these matters pursued and judged with the burden of proving good faith resting on the Government and with proper action by the trial judge to obtain and evaluate the materials. In the absence of satisfactory alternative means of discovery, the legal errors committed by the law officer and the Board of Review deprived the accused of rights which were extremely valuable to him—of cardinal moment in this case. He was denied a necessary step toward obtaining, or discovering the status of, materials of first-rank for his defense. In our view, this denial, in the circumstances, seriously impeded his right to a fair trial in violation of the Due Process Clause of the Constitution.

Since his conviction and dismissal were thus invalid, plaintiff is entitled to recover back pay and allowances, less appropriate offsets, from the date on which the pay and allowances were withheld to the date of judgment. The plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. Judgment is entered to that effect. The amount of recovery will be determined under Rule 47(c).

ORDER

These cases come before the court on motions for rehearing, reconsideration, new trial and for further relief pursuant to Rules 68 and 69 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 9th day of November 1967 that said motions be and the same are denied as follows:

228-58 Perini Corporation, et al. Defendant's motion for reconsideration.

357-64 Richard G. Augenblick. Defendant's motion for reconsideration.

29-66 The Home Indemnity Company. Defendant's motion for rehearing and new trial

BY THE COURT

/s/ Wilson Cowen
WILSON COWEN
Chief Judge

RELEVANT DOCKET ENTRIES

Petition	Filed October 12, 1965
Defendant's Answer	Filed January 28, 1966

Exhibits:

Joint Exhibit 1

Joint Exhibit 2 (Extracts from the Record of the Air Force Board for the Correction of Military Records)

Joint Exhibit 3 (Transcript of the general courts martial trial plus exhibits)

Defendant's Exhibit 1 (Advice of the Staff Judge Advocate)

Opinion of Court of Claims	Filed October 13, 1967
Order denying motion for reconsideration	Filed January 19, 1968

ORIGINAL

* * * *

PETITION—Filed October 12, 1965

1. The plaintiff, whose address is 8121 N. Institute, Colorado Springs, Colorado, brings this action to recover amounts lost by him as a result of a court martial.

2. The plaintiff predicates this action upon the Fifth and Sixth Amendments of the Constitution of the United States, upon 10 U.S.C. 1552, upon 10 U.S.C. 801 et seq., and upon the regulations issued thereunder.

3. Up until approximately 18 July, 1961 the plaintiff was Non-Commissioned Officer in Charge, Law Enforcement Section, 48th Air Police Squadron, 48th Air Base Group at RAF Station Lakenheath, Suffolk, England. On that date he was arrested and confined in relation to alleged blackmarketing activities but shortly thereafter he was released. No charges were issued against plaintiff at that time but he was assigned to duties far below his rank.

4. At this time plaintiff was a master sergeant with an excellent service record including the receipt of the Silver Star and Bronze Star for personal bravery.

5. In August, 1961 plaintiff requested the Staff Judge Advocate, Major Clifford R. Carver, to furnish him legal counsel, but he was told that he could not then talk to any of the legal officers and that he would be told when it was necessary to get a lawyer.

6. Without ever receiving any further response to his request for counsel, plaintiff, in late October, 1961, was told to report to Captain Richard R. Lee of the Office of the Staff Judge Advocate. Captain Lee questioned plaintiff in detail about the alleged blackmarketing activities which were later to be the basis of the charges against the plaintiff. In a second interview Captain Lee again questioned plaintiff in detail and induced plaintiff to send his wife down to be interviewed. At no time did Captain Lee inform plaintiff of his right to counsel.

7. On November 2, 1961 Airman Frank W. Hughes was court-martialed for certain blackmarketing activities, convicted and sentenced to six months confinement, loss of forty three dollars a month and reduction to Airman

Basic. Thereafter, the Air Force brought heavy pressure on Hughes to compel him to give a statement against plaintiff. Hughes was told he would be tried on other charges, confined for five years and given a dishonorable discharge unless he gave a statement against the plaintiff. As a result, Hughes did give a statement against plaintiff, which statement was false, and, thereafter, he received favored treatment, including not being confined in the regular prison, having his sentence reduced to 104 days, receiving liberty and Christmas leave, and being assigned easy work such as typing.

8. On November 29, 1961 charges, including ten specifications were served on plaintiff and on January 30, 1962 he was tried and convicted on the charges and six of the specifications but he was acquitted on four of the specifications. Plaintiff was sentenced to be reduced to the grade of Airman Basic, to forfeit $55 per month for six months, and to be confined for six months. The aforesaid Captain Lee was the Trial Counsel in plaintiff's court-martial.

9. Hughes' testimony against the plaintiff, which testimony was false, was the only evidence establishing the criminal elements of the charges and specifications against the plaintiff. Hughes had been engaged in blackmarketing activities for years. In addition, he was an admitted perjurer, a convicted blackmarketeer in the Courts of England in addition to his own court-martial, a receiver of stolen goods, and a named accomplice in the specifications against the plaintiff.

10. Upon review, plaintiff's sentence was approved. On October 27, 1962 plaintiff submitted an application, with twenty affidavits in support thereof, to the Air Force Board for the Correction of Military Records seeking a reversal of the sentence. On September 17, 1963 the Board denied the application upon the ground that sufficient evidence had not been submitted to show a probable error or injustice. No appeal was possible under law to the United States Court of Military Appeals.

11. The plaintiff has exhausted his administrative remedy. The decision of the Air Force Board for the Correction of Military Records was arbitrary and capri-

cious and not supported by substantial evidence upon the record before it.

12. In addition, plaintiff's court-martial was in violation of the provisions of the Constitution and null and void for the following reasons:

(a) Plaintiff was denied proper counsel.

(b) Plaintiff and his wife were interrogated by the Trial Counsel under improper and illegal circumstances.

(c) The charges and specifications were too vague and indefinite.

(d) The uncorroborated testimony of Hughes was not sufficient to support the conviction.

WHEREFORE, plaintiff prays judgment for all amounts he has lost as a result of the said court-martial, including the pay he has lost as a result of his reduction in rank.

/s/ Francis J. Steiner, Jr.
FRANCIS J. STEINER, JR.
Attorney for Plaintiff
826 Stahlman Building
Nashville, Tennessee 37201

DEFENDANT'S ANSWER—Filed January 28, 1966

In answer to plaintiff's petition herein defendant:

1-4. Admits the allegations contained in paragraphs 1-4 of the petition.

5 and 6. Denies the allegations contained in paragraphs 5 and 6 of the petition.

7. Admits the allegations contained in the first sentence of paragraph 7 of plaintiff's petition; denies the remainder of the paragraph.

8. Admits the allegations contained in paragraph 8 of the petition except to aver that the date is January 18, 1962.

9. Denies the allegations contained in paragraph 9 of the petition except to admit the last clause thereof.

10. Admits the allegations contained in paragraph 10 of the petition.

11. Admits the allegations contained in the first sentence of paragraph 11 of the petition; denies the remainder of the paragraph.

12. Denies the allegations contained in paragraph 12 of the petition.

13. Except as herein admitted, denied, or qualified, defendant denies all the allegations of material fact contained in the petition.

WHEREFORE, plaintiff's petition should be dismissed.

/s/ John W. Douglas
JOHN W. DOUGLAS
Assistant Attorney General
Civil Division

/s/ Charles M. Munnecke
CHARLES M. MUNNECKE
Attorney, Civil Division
Department of Justice

(477)

STAFF JUDGE ADVOCATE'S REVIEW OF TRIAL BY COURT-MARTIAL

	X GENERAL	1. DATE OF REVIEW: 20 April 1962
	SPECIAL	2. DATE OF TRIAL: 30 January 1962 to 8 February 1962

3. TO:
Commander
Third Air Force
APO 125, US Forces

4. PLACE OF TRIAL:
RAF Station Lakenheath
Suffolk, England

The attached record of trial by court-martial has been referred to me in accordance with the provisions of the UCMJ and MCM, 1951. I have examined the record and submit herewith my review with opinions, recommendations and reasons therefor.

ACCUSED

5.	6. AFSN	7. GRADE	8. AFSC	9. CHARACTER OF SERVICE (Prior to charges)
United States v. (Last name, first name, middle initial) JUHL, KENNETH N.	AF16032438	MSgt	77170	Excellent

10. AGE NEAREST BIRTHDAY AT TIME OF TRIAL	11. MARRIED	12. RACE	13. SCORES
41	X YES / NEVER	X WHITE / NEGRO / OTHER	AFQT AGC ARC SCORES

14. ORGANIZATION	15. NO. SCHOOL YEARS COMPLETED	16. AIRMAN ON COURT	17. CIVILIAN COUNSEL	
48th Supply Squadron	8 GED - HS	X YES / NO	YES / X NO	Mech 90, Cler 80, Tech Sp 60

18. NO. OF PREVIOUS CONVICTIONS	19. NO. OF ARTICLE 15 PUNISHMENTS	20. PSYCHIATRIC REPORT	
None	None	YES / X NO	RESULTS

PRETRIAL PAY DATA

21. BASIC PAY	22. SEA OR FOREIGN DUTY	23. TOTAL	24. CLASS Q	25. NO. OF DEPENDENTS
$350.00	$ 22.00	$ 372.50	$ 80.00	5

RECORD OF SERVICE

26. INITIAL DATE OF CURRENT SERVICE	27. TOTAL CREDITABLE ACTIVE SERVICE TO DATE OF SENTENCE (Include prior periods of creditable active service and current service to date of sentence; show total amount in months)
18 November 1960	202
28. TERM OF CURRENT SERVICE: 3 years	

DATA AS TO PRETRIAL RESTRAINT

29. NATURE AND DATE OF ANY RESTRAINT IMPOSED	30. LOCATION	31. TOTAL DAYS
Confined 18-19 July 1961	RAF Station Lakenheath	1 day

PLEAS, FINDINGS AND SENTENCE

32. SENTENCE ADJUDGED	33. DATE ADJUDGED	34. SENTENCE APPROVED BY C/A (Specify)
To be reduced to the grade of Airman Basic, to forfeit $55.00 per month for six months, and to be confined at hard labor for six months	2 Feb 1962	

35. MAXIMUM SENTENCE FOR OFFENSES SUSTAINED UPON REVIEW	36. SENTENCE RECOMMENDED	37. PLACE OF CONFINEMENT
Dishonorable Discharge, total forfeitures, reduction to lowest enlisted grade, confinement at hard labor for ten years and three months	As adjudged, except the sentence to forfeiture should be reduced to $43.00 per month for 6 months	10th Tac Recon Wg., Consol. Confinement Fac, RAF Molesworth

38. SYNOPSIS OF CHARGES AND SPECIFICATIONS	39. PLEAS	40. FINDINGS	41. APPROVAL RECOMMENDED
CH. I: Violation of UCMJ Art. 81	NG	G	Yes
Sp. 1: Conspiracy to violate USAFE Sup. 1 to AFR 147-14 effected by transporting 140 boxes of cigars.	NG	G	Yes
CH. II: Violation of UCMJ Art. 92	NG	G	Yes
Sp. 1: Violation of USAFE Sup. 1 to AFR 147-14 by purchasing AFEX merchandise (six transistor radios) in excess of reasonable amounts.	NG	NG	
Sp. 2: Violation of USAFE Sup. 1 to AFR 147-14 in conjunction with another by possessing AFEX merchandise (140 boxes of cigars) in excess	NG	G	Yes

ACM 17972

(CONT'D)

tell them anything to put anybody in a trick if it will get me out of it myself." (R 254) Also, following his Article 15 he said, "After the bull-shit I told those people they've got enough to hang Juhl." (R 254)

Shields wanted Juhl to "fix" a traffic ticket (R 359).

Shields told Juhl that he had made a false statement about him to the OSI (R 361). Also, that he (Shields), was one of the biggest "floggers" on the base and that he had really dropped Juhl in the shit (R 372-373).

d. On Impeachment of Accused

The following occurred on redirect examination of Hughes:

"Airman Hughes, you testified in your cross-examination about some tools. Do you know what's happened to these tools?
Yes, sir. Most of them were shipped home.

What happened to the others?
There was a few items given to Sergeant Juhl, sir.

What items in particular?
I recall a hunter's lamp and an electric soldering iron, sir."

"Would you answer the question.
Yes, sir. On numerous occasions when I'd be with Sergeant Juhl and on leaving him he would say, "Say that everything you told Captain Miller was a lie."

The accused told you this?
Yes, sir.

On numerous occasions?
Right, sir.".

(R 136)

On the question of whether Captain Miller would believe Juhl under oath:

"Q. What's your opinion now?

A. That, dealing with the black market, not necessarily would he tell the complete truth." (R 159)

Shields testified in regard to Juhl:

"Q. What did he ask you?
A. Well, he asked me if I could go on the stand and just say that I think that I got the number from him.
Q. Has he asked you this more than once?
A. Yes, sir.
Q. Can you remember how many times he's asked you this?
A. At least twice. Maybe three times." (R 168)

* * * *

2. *Comments*

An assignment of errors has been received by telephone from the counsel for the accused, and they are as follows:

1. The law officer erred to the prejudice of the accused by refusing to give the instruction as requested by the defense as follows:

> "A conviction cannot be sustained solely on the impeached testimony of a witness or witnesses, even though motive to commit the offense is shown."

2. The accused was deprived of an impartial clemency evaluation by the Staff Judge Advocate as required by paragraph 65.b.1 of AFM 110-8 and as implemented by paragraph 3a of Third AF Regulation 111-7. See matters submitted with accused's receipt for copies of clemency papers.
3. The law officer erred to the prejudice of the accused by denying the defense's motion to dismiss all charges and the specifications thereunder due to deprivation of a speedy trial.
4. The law officer erred to the prejudice of the accused in denying the motion of the defense to dis-

miss Specification 3 of Charge II. This specification is defective in that it does not define with sufficient particularity the person to whom the accused allegedly sold the AFEX items in question and is therefore incapable of being defended.

5. The law officer erred to the prejudice of the accused in denying the motion of the defense to dismiss the specification of Charge I in that it does not inform the accused with sufficient particularity of what offense in violation of paragraph 51.1.c USAFE Sup. 1 to AFR 147-14 the conspiracy allegedly consisted. The cited paragraph is so obscure and vague that it is impossible to know precisely what offense is alleged.
6. The law officer erred to the prejudice of the accused in denying the defense's motion to dismiss all charges and specifications in that the USAFE Sup. 1 to AFR 147-14 and USAFE Reg. 176-1 are not applicable to the accused since the footnotes of both regulations limit their applicability to ANFEA 16th Air Force, 7th Air Division and 6900 Security Wing. The accused is not a member of any of the specified organizations.
7. The law officer erred to the prejudice of the accused in denying the defense's motion to dismiss Specifications 4 and 9 of Charge II in that the alleged purchase of AFEX items in an irregular manner is not sufficiently specific to state an offense. Such a specification is so vague that it does not put forth a standard of conduct that is readily ascertainable in advance by men of ordinary intelligence.
8. The law officer erred to the prejudice of the accused in denying the defense's motion to dismiss Specifications 2, 7, and 9 of Charge II on the basis that the regulation shifts the burden of proof to the accused. Under this regulation the accused must show that the quantities of merchandise in question were commensurate with the individual's justifiable need under the particular circumstances of purchase, possession, and transportation.

9. The law officer erred to the prejudice of the accused in denying the defense's motion for appropriate relief with respect to trial counsel's prior association with the accused in an attorney-client relationship, thereby disqualifying the trial counsel. The accused confided in trial counsel and revealed the defense to him under the impression that it was a privileged communication. Trial counsel questioned the accused about matters pertaining directly to his defense without benefit of counsel, either available or present, during such periods.

* * * *

Concerning the assignment of error based on the fact that the law officer did not give the impeachment instruction requested by the defense:

> "A conviction cannot be sustained solely on the impeached testimony of a witness or witnesses, even though motive to commit the offense is shown."
>
> (R 458)

Impeachment was, of course, a very important matter to the defense. And in fact, as to Hughes, the defense said this out of the presence of the court:

> "The whole case hinges on this man's testimony. If I can't impeach him effectively, I'm done."
>
> (R 111)
>
> "It's the contention of the defense that this witness had all kinds of knowledge about the activities of Airman Shields. Therefore, he forced Airman Shields to make a statement against the accused in this case, and Airman Shields got off with Article 15 punishment, whereas with the information that Hughes knows if Shields didn't spill on Juhl he would have gotten a far greater punishment. That's my defense, and I feel it is relevant and material in this case, and I don't want to tell the prosecution about it. My defense is this: This witness lied on Sergeant Juhl. He framed him. And in order to frame him Shields backed up this witness' story, and the reason that he

backed up this witness' story is because Hughes, this witness, knew too much about Shields and if he didn't talk he could squeal on him. This is my only defense in the case."

(R. 131)

With this in mind we may consider the instructions that were given that related to impeachment:

"Gentlemen, on this matter of inconsistent statements, lying, perjury, and all that sort of thing: Counsel has the right to show prior statements which have been made which he may feel are inconsistent with testimony that's been given on the stand. As to whether or not they are inconsistent, as to whether or not the witness is lying now or has lied before or is worthy of belief, all these things are for you to decide. It doesn't make a great deal of difference what counsel or I might think. That's why I caution and why we have these objections about referring to the man's lying. Here's a statement he made previously; here's another statement he's testified to now. Weigh the evidence as given on the stand in the light of all these things.

* * * *

"This evidence of prior statements can be considered only for the purpose of testing the individual's credibility, his worthiness of belief.

* * * *

"Evidence has been introduced as to the bad character for truth and veracity of the witness Airman Shields. You are advised that this evidence is admissible for the purpose of assisting you in determining his worthiness of belief and the weight to be given to his testimony. However, such evidence is not the only factor which you may consider in judging the credibility of the witness. In making your determination, you may also consider all other factors bearing upon the credibility of this witness. These factors include but are not limited to such things as the acuteness of his powers of observation, the accuracy and re-

tentiveness of his memory, his general manner in giving evidence, his relation to the matter in issue, his appearance and deportment, his friendships and prejudices, comparison of his testimony with other statements made by him and with the testimony of others and by any other evidence bearing upon his veracity.

* * * *

"The court may draw its own conclusions as to the credibility of a witness and attach such weight to his evidence as his credibility may warrant. However, there are cases in which the court would be justified in attaching no weight at all to the testimony of a particular witness or in which the court would not be warranted in accepting certain testimony as sufficient in and of itself to establish the guilt of an accused.

"In this regard, I would like to advise you concerning the meaning and effect of the impeachment of a witness. You are advised that the term "impeachment" means the adducing of proof which has the effect of diminishing the credibility of a witness or the worthiness of belief of the testimony given by him. It is within your province to resolve whether or not a witness has been impeached and to attach such weight to his evidence as his credibility may warrant.

"The credibility of a witness is his worthiness of belief. In judging the credibility of the witnesses in this proceeding, you should carefully weigh the testimony given, and in so doing consider all the circumstances under which any witness has testified: his demeanor and manner while on the stand; the acuteness of his powers of observation; his interest, if any, in the outcome of the case; his friendships and prejudices; the extent to which he is contradicted or corroborated by other credible evidence, if at all; and any circumstances that tend to shed light upon his credibility, taking into account your own experience in dealing with people."

(R 187, 188, 467, 468, 469)

The instructions on impeachment were correct, although the prevalent view seems to be that witnesses concerned should not be mentioned by name (58 Am. Jur, Trial, sec. 569). In any event, the accused was acquitted of the specifications concerning the witness mentioned, Shields, and this couldn't have prejudiced the accused anyway.

The only question is whether the law officer should have gone farther. It is true, of course, that the Manual for Courts-Martial provides that a conviction cannot be sustained solely in the self-contradictory testimony of a particular witness, even though motive to commit the offense is shown, if the contradiction is not adequately explained by the witness in his testimony. (MCM 1951, par 153a.) But the only motive that I see for the accused to have committed the offenses is that which is normally present in such activities—pecuniary gain. Therefore, I cannot see that an instruction concerning motive in any respect was necessary. The court was told that there are cases in which the court would be justified in attaching no weight at all to the testimony of a particular witness or (and) in which it would not be warranted in accepting certain testimony as sufficient in and of itself to establish the guilt of an accused; further, the court would attach such weight to the witness's evidence as his credibility might warrant. This met the requirement that the credibility of a witness is a matter to be determined solely by the jury (Wharton's Criminal Evidence, 11th Ed., sec 1411). "Impeachment" having been sufficiently defined (U.S. v. Kauth, 11 USCMA 261, 29 CMR 77), when the impeachment instructions are considered with the other instructions on presumption of innocence, reasonable doubt, and burden of proof, I cannot see anything else to which the accused was entitled on this matter. Indeed, the requested instruction comes dangerously close to the prohibition that a jury may not be instructed as to the weight which is to be given the testimony of witnesses, and the weight to be given impeaching evidence (58 Am. Jur. Trial, sec. 780). Similarly, it approaches the generally prohibited instruction referred to as "Falsno in Uno, Falsus in Omnibus," which is better put in the English of Black's Law Dictionary as "False in one thing,

false in everything" (4 ALR 1081, 1105). The assignment of error is not meritorious.

I note that no instruction on accomplice testimony was given. In view of the other instructions and the issues that were clearly drawn for the court's decision, no such instruction was necessary. Further, the defense specifically declined it (R 454). The accused was not prejudiced by the fact that the instruction wasn't given.

* * * *

The foregoing review constitutes this reviewer's summary of the evidence, opinion as to the adequacy and weight of evidence, effect of any error or irregularity respecting the proceedings, and recommendations as to the action to be taken with respect to the findings and the sentence. As the convening authority in this case, you are empowered to weigh the evidence, judge the credibility of the witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Before approving a finding of guilty you must determine that such finding is established to your satisfaction beyond a reasonable doubt by competent evidence of record. In acting on the findings and sentence, you are empowered to approve only such findings of guilty and the sentence, or such part or amount of the sentence, as you find correct in law and fact and as you in your discretion, after consideration of all clemency matters, determine should be approved.

A form of action appropriate to my recommendations is attached.

/s/ Charlie Y. Wier
CHARLIE Y. WIER
Lt Colonel, USAF
Acting Staff Judge Advocate

Review No. G4-62

EXTRACTS FROM RECORD BEFORE AIR FORCE BOARD FOR THE CORRECTION OF MILITARY RECORDS

EXHIBIT 9

AFFIDAVIT

I, Mrs Bertha Squire, 41 Thetford Road, Brandon, Suffolk, England having been duly sworn do depose and say as follows:

1. I first became acquainted with MSGT Juhl during the month of June or July 1961. On this occasion he visited my home with an Airman Frank Hughes.

2. My husband and I were sitting in the yard when they arrived. They entered via the side gate entrance to our house. After I had been introduced to Sgt Juhl my husband offered them a beer. My husband and Hughes entered the back door of the house and they returned several minutes later with the beer. During this entire period Sgt Juhl was sitting with me and at no time did he leave. After Sgt Juhl and Airman Hughes finished their drinks, which was 25 or 30 minutes later, they departed.

3. At no time was there any mention of cigars, cigarettes, liquor and/or other duty free items by any of us during our conversation.

4. I have been informed that it was alleged that during this time Sgt Juhl was watching for passing cars or persons comming down the road while my husband and Hughes unloaded duty free items from a car. It is impossible to see the street or see who is passing from either direction from our yard and since Sgt Juhl was in the yard during the entire period, the allegation is completely false and fabricated.

/s/ Bertha Squire
BERTHA SQUIRE
Housewife

Subscribed and sworn to before me this 29th day of June 1962.

/s/ Edwin L. Atkins
EDWIN L. ATKINS
Major, USAF
Summary Court Officer

AFFIDAVIT

I, MSgt Forrest Herron Jr., 1004C-CC Street Randolph Air Force Base, Texas having been duly sworn, do depose and say as follows:

1. On 26 January 1962, I was given orders to report to the Staff Judge Advocate at Lakenheath AFB, England, not later than 30 January 1962. I arrived at the London Airport on the night of 30 January, and as I was getting off my plane I was met by an Air Force Captain, Captain Kenton D. Miller-Provost Marshal-Lakenheath AFB, a Senior Master Sgt. Collier-Lakenheath Air Police Squadron, and a British Constable. Both the Captain and the Sergeant were wearing their Air Police badges, and they told me to follow them, the Sergeant taking both of my bags. Immediatey after I "cleared" customs, with the Captain in front of me and the Sergeant and British Constable behind. I had no choice but to accompany these men to a waiting staff car. It was very embarrasing to me as there wepe fourteen other Air Force Personnel on the Pan-Am flight with me some of whom I had made friends with. They drove me to a half deserted looking building somewhere on the airport. They took me down a long corridor, to a small room, and then started asking me questions.

2. I was read Article 31 (Uniform Code of Military Justice) by Captain Miller, and then Captain Miller started asking me about the testimony that I was going to make at Sgt. Juhl's Court Martial, and they were asking me about some of the things that were in my written sworn statement that I had made at the legal office at Randolph AFB, concerning Sgt Juhl, but they kept saying that they hadn't read or seen my statement. They said over and over again that they were not questioning me about Sgt. Juhl, but every question they asked me was about the coming court martial and Sgt. Juhl. Both the Captain and the Sgt. asked me if I wanted to change my statement, and they continued saying they hadn't seen my statement. They suggested to me to change my statement and that I might get into trouble if I made my intended testimony in court.

3. The trial was over on 2 February 1962. On Monday 5 February 1962, Captain Miller, contacted Sgt Klien asking him if I left for the States. If not he would like for me to call him. I immediately called Capt Miller and he told me to see him in his office. When I reported to him, Sgt Collier was there and they started questioning me behind closed doors again in regards to Sgt Juhl. He said that because Sgt Juhl's verdict was "Guilty" that I took the witness stand and lied. Then the Captain started reading from some papers on his desk and he started asking me the same questions that the prosecutor had asked during the trial. Then he said, "I don't know whether you'll be tried for perjury or not". Now if you want to change your story we can go right up to the legal office right now. I told him everything I had said on the witness stand was the truth. I told them that I would not change my statement for anyone. As I was leaving the Captains Office he said, "I don't think I've made myself clear, there may be perjury charges preferred against you". I actually believe they wanted me to make a statement against Sgt Juhl.

/s/ Forrest Herron Jr.
FORREST HERRON JR
MSgt USAF

Subscribed and Sworn to before me on this 19 day of October 1962.

/s/ Mary H. Elkins
MARY H. ELKINS
Notary Public, Bexar County, Texas
My Commission Expires May 31, 1963

EXHIBIT 15

12 September 1962

STATE OF ILLINOIS)
) ss
COUNTY OF CHAMPAIGN)

AFFIDAVIT

I, Technical Sergeant Donald A. Butner, United States Air Force, presently stationed at Chanute Air Force Base, Illinois, do hereby swear and affirm that the following statement of facts is correct and true to the best of my knowledge. This statement is being based on my own personal knowledge of the facts and circumstances surrounding the General Court-Martial and subsequent reduction of Master Sergeant Kenneth N. Juhl to Airman Basic pursuant to sentence by the said court. My capacity during the period preceding and immediately after the above-mentioned court-martial was as a Technical Sergeant in the Air Police Squadron at RAF Station Lakenheath, APO 179, New York, New York.

Sergeant Juhl was charged and tried for blackmarketing and dereliction of duty. Airman Basic Frank W. Hughes was the primary witness for the prosecution. This affidavit and the information contained herein is directly concerned with the reasons why Airman Hughes appeared as a witness for the prosecution.

Prior to 2 November 1961 Airman Hughes held the rank of Airman First Class and was assigned to the Air Police Squadron at Lakenheath. This individual, from 1 February to 1 July 1961, was under my direct supervision and control. My association with this man continued until 2 November 1961 when Airman Hughes was arraigned and tried by a Special Court-Martial on charges of blackmarketing at RAF Station Lakenheath, APO 179, New York, New York.

Of approximately ten (10) or more specifications brought against this individual, approximately seven (7) were dropped immediately prior to trial. The remaining specifications were referred for trial and resulted in the court reaching a finding of guilty, and adjudging a sen-

tence of six (6) months confinement at hard labor, and forfeiture of two-thirds (⅔) pay per month for six (6) months.

Subsequent to Airman Hughes' trial and prior to Sergeant Juhl's court-martial, this Airman was advised that unless he agreed to appear as a prosecution witness and testify, he would be tried by a General Court-Martial on the dropped specifications, and that the sentence adjudged would be confinement at hard labor for five (5) years and a Dishonorable Discharge. That if he agreed to so testify, he would be given immunity from any further criminal liability in reference to the dropped specifications.

Airman Hughes, immediately after his court-martial, stated to me, the undersigned, that in his opinion he did not know anything concerning the charges being brought against Sergeant Juhl; that unless he agreed and did in fact testify, the old charges would be renewed against him; that he would receive a sentence of five (5) years confinement and a Dishonorable Discharge; and that if he were so sentenced he was sure that his wife, a foreign national at the time, would commit suicide.

/s/ Donald A. Butner
DONALD A. BUTNER
TSgt, USAF

Subscribed and sworn to before me this 12 day of September 1962.

/s/ Joyce M. Zimmerman
Notary Public

My Commission expires: 28 Aug. 1965.

[421]

TRANSCRIPT OF PROCEEDINGS HELD JANUARY 30-FEBRUARY 2, 1962 (GENERAL COURT MARTIAL).

* * * * *

STAFF SERGEANT WAYNE K. STEDLEY was called as a witness for the defense, was sworn, and testified as follows:

Questions by the prosecution:

Q. State your full name, rank, service number, and organization, please.

A. Wayne Kent Stedley, Staff Sergeant, 48th Air Police Squadron, AF17292771.

Q. You're stationed on this station and a member of the United States Air Force?

A. Yes, sir.

TC: Your witness, Counsel.

DC: Thank you.

DIRECT EXAMINATION

Questions by the defense:

Q. Sergeant Stedley, who informed you to come down here just now?

A. It was Airman Rolf, sir, the court man.

Q. After you came down here, have you talked with anybody in the outer office?

A. No, sir.

Q. Did you make a trip this morning with Airman Hughes?

A. Yes, sir.

Q. Where did you go?

A. Out to his trailer.

Q. What was the conversation on the way out to his trailer? Do you remember?

A. Nothing, I don't know, of any importance. That he just wished all this was over. Nothing more than that, sir.

Q. This was over?

A. Yes, sir. The trial.

Q. He did talk about the trial?

A. Yes, sir.

Q. And then, after arriving at Airman Hughes' or Mrs. Hughes', what did you do?

[422] A. We got out and went into the trailer. He told his wife to get dressed, that she was to appear in court today.

Q. Did they have any discussion in the trailer?

A. Nothing other than she asked him why, and he said he didn't know, maybe ask her some questions about the trial.

Q. Were they alone in the trailer at any time?

A. No, sir. I was right there.

Q. You were right there the whole time?

A. Yes, sir.

Q. Did you hear any talk about a trip to Southend mentioned between Airman Hughes and his wife this morning?

A. Yes, sir.

Q. Where was this discussion?

A. In the trailer.

Q. What was said?

A. Oh, cannot remember the straight words, but I believe he asked her if she remembered that they did go, and she said yes, and he (pause) asked her if she remembered going on two shopping trips.

Q. Two shopping trips. You remember that distinctly?

A. Yes, sir. And she said yes. And the rest of it was —I couldn't say—what other went on.

Q. Do you remember Airman Hughes mentioning a bunch of money?

A. Yes, sir; I do. He asked her if she remembered that.

Q. And she said yes.

A. Yes, sir.

Q. And did he ask her if she remember the four children in the Chinese restaurant?

A. Mentioned the four children, sir, not any—specific restaurant.

Q. You don't remember any mention of a Chinese restaurant?

A. No, sir.

Q. The bunch of money was mentioned at what time? Do you remember? I mean concerning this trip. Whom was it mentioned in relation to?

A. I don't quite understand, sir.

[423] LO: Can you remember just about what was said about this bunch of money? Or who started it off?

WITNESS: He asked her if she remembered about a bunch of money being flashed. This was said. And she said, "Yes. And Mrs. Juhl asked where Sergeant Juhl had got it."

LO: Who said that?

WITNESS: Mrs. Hughes. Yes.

LO: He didn't say that?

WITNESS: No.

Questions by the defense (continued):

Q. She asked him where he got it?

A. Pardon?

Q. She asked Mrs.—

LO: No; no.

WITNESS: Mrs. Juhl asked Mrs. Hughes—

LO: Mrs. Hughes was relating this; is that right?

WITNESS: Yes.

—where he had gotten this money. And she said maybe he sold a car or maybe that they—and they wouldn't believe this; and that was all that was said about the money.

Questions by the defense (continued):

Q. Was there a mention of another sergeant?

A. (Pause.) Sergeant Herron?

Q. Yes. What was mentioned about Sergeant Herron? Who mentioned Sergeant Herron?

A. Now, wait a minute. (Pause.) Airman Hughes, I believe—yes—stated that Sergeant Herron had told a story on trial and lied, sir.

Q. That's what Hughes said?

A. Yes, sir. And—

Q. He told this to Mrs. Hughes?

A. (Nodding affirmatively.) He said probably Sergeant Juhl had written him, maybe, and told him not to say any-

thing. At this time she went into the bathroom and dressed.

[424] Q. And he didn't go in with her?

A. No, sir.

Q. Did they have conversation on the way out to the base?

A. None, sir, other than she be sure and not to—if she didn't understand the question, to be sure and ask.

DC: No further questions. Your witness.

CROSS-EXAMINATION

Questions by the prosecution:

Q. Sergeant, did you have any impression whatsoever that Airman Hughes was trying to tell Mrs. Hughes what to say at this trial?

A. No, sir.

Q. He was simply just asking her questions to see if she remembered?

A. That's what it seemed to me.

Q. Is that the impression you gained?

A. Yes, sir.

TC: I have no further questions.

REDIRECT EXAMINATION

Questions by the defense:

Q. Weren't the questions rather suggestive that Airman Hughes was asking?

A. (Pause.) Well, what is suggestive, sir?

Q. Did they call for a specific answer?

A. (Pause.) Well, it sounded to me like he just asked her these things to be sure that she knew.

Q. He asked her these things to make sure she knew what?

A. Understood what the people—

DC: No further questions.

LO: People want to talk to her about? Is that what you mean?

WITNESS: Yes, sir.

LO: Just these two or three general questions?

WITNESS: Yes, sir. That's all it was. Just a little conversation.

[425] LO: Any member of the court desire to question Sergeant Stedley?

EXAMINATION BY THE COURT

Questions by CMSgt Clevenger:

Q. For what reason is Airman Hughes—did he accompany the Air Policeman to pick up Mrs. Hughes? Is that customary? Or is it a safety precaution on the part of the Air Force asking someone to visit a dependent wife's trailer—you know what I mean—unaccompanied? For what purpose did they stop and get Airman Hughes and take him along with the Air Policeman?

LO: Or do you know?

WITNESS: Are you asking me, sir?

Questions by CMSgt Clevenger (continued):

Q. If you can answer it, yes.

A. I couldn't tell you. Other—it's—from our point of view, it's kind of a bad policy to go to a trailer with a woman unaccompanied.

CMSGT CLEVENGER: That's about what I had in mind. May I ask one more question along the same line?

LO: Yes.

Questions by CMSgt Clevenger (continued):

Q. Would it be acceptable to Air Police to have two Air Policemen go to provide that degree of security that you're speaking of?

A. But this still wouldn't replace the husband.

CMSGT CLEVENGER: I see. Thank you.

REDIRECT EXAMINATION

Questions by the defense:

Q. Is it normal procedure to send a prisoner out to pick up his wife or anybody else? Is this done normally?

TC: This calls for a conclusion, sir.

DC: I think he can answer. I doubt if they've ever—

WITNESS: I done so on my NCOIC's order.

LO: Do you know if they've done this before?

[426] WITNESS: This is the first time I, myself, have ever done it.

LO: Any other questions of the sergeant?

(Negative response.)

LO: You may be excused, Sergeant Stedley. Thank you very much.

(The witness withdrew from the courtroom.)

LO: Let the record reflect that Mrs. Hughes spoke with a decided German or some kind of accent. Seemed it was a little bit difficult to understand. She had difficulty understanding sometimes, too. Is that—

DC: Fair enough.

TC: Did you have any difficulty understanding, sir?

LO: Who? Mrs. Hughes?

TC: Yes, sir.

LO: Sometimes.

TC: I don't want what will later appear in the record to seem to be something that the court reporter might have thought up to put in the record. You understood the gist of everything she said, did you not?

LO: I only mention this because it may seem that people asked her to repeat quite frequently, and, on review, if it looks that way, why, it's because sometimes they had difficulty understanding what she was saying. I didn't.

TC: Very well.

• • • •

[454] LO: Let the record show that this is an out-of-court hearing attended by counsel for both sides, the accused, the law officer, and the reporter. This will be included in the record.

Each of you has had an opportunity to go over the proposed instructions, haven't you?

DC: Yes, sir.

TC: Yes, sir.

LO: It's my understanding, now, that the accused does not want instruction on accomplice testimony.

DC: That is correct, sir. This was not the theory of the defense.

• • • •

OFFICE OF THE STAFF JUDGE ADVOCATE
HEADQUARTERS THIRD AIR FORCE (USAFE)
UNITED STATES AIR FORCE

ADVICE OF THE STAFF JUDGE ADVOCATE

1. The attached charges and specifications against Master Sergeant Kenneth N. Juhl, AF6932488, 48th Supply Squadron, 48th Air Base Group, RAF Station Lakenheath, Suffolk, England, have been referred to me for advice and consideration pursuant to Article 34, Uniform Code of Military Justice, and paragraph 35b, Manual for Courts-Martial 1951.

* * * *

* * * * Likewise, in event of trial the court must be instructed in regard to whether the witnesses have been impeached, and to the effect that if the members find that the testimony of the accused's alleged accomplices is uncorroborated such testimony will not support a conviction if self-contradictory, uncertain, or improbable. Further, that even though apparently credible, the accomplice testimony is of doubtful integrity and is to be considered with great caution (Par 153a, p. 289, MCM 1951; US v. Scales, 10 USCMA 326, 27 CMR 400; US v. Woodfork, CM 392-563, 22 CMR 531). * * * *

* * * *

7. The accused's commander, the Article 32 investigating officer, and the officer exercising special court-martial jurisdiction over the accused, all recommend trial by general court-martial. The nature and seriousness of the offenses alleged warrant trial by general-court martial, and after considering all mitigating matter and the quality of the available evidence, I so recommend.

* * * * *

9. In summary of the recommended specification amendments in event of trial, they are: Delete the figures "60" in Specification 4 of Charge II, change the figure "63" to "50" in Specification 7 of Charge II, change the parenthetical "three cartons of cigarettes" found in Specification 8 of Charge II to "two cartons of cigarettes," and

change the reference to paragraph 51 in Specification 9 to "paragraph 51.1."

/s/ Charlie Y. Wier
CHARLIE Y. WEIR
Lt Colonel, USAF
Asst Staff Judge Advocate

I have read the foregoing advice and all papers attached thereto. I concur.

/s/ James S. Cheney
JAMES S. CHENEY
Colonel, USAF
Staff Judge Advocate

Approved: Jan. 18, 1962

/s/ John H. Ives
JOHN H. IVES
Major General, USAF
Commander

KENNETH N. JUHL

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

OPINION

NICHOLS, *Judge*, delivered the opinion of the court:*

This is an action by Sergeant Juhl, an enlisted career man in the Air Force, to recover back pay and forfeitures he has lost as a result of his conviction, after trial, by a General Court Martial. His counsel asserts on his behalf that the conviction was contrary to the constitution and invalid on several grounds. We hold that the court martial lacked jurisdiction to convict because it was prohibited from so doing by Section 153a, Manual For Courts-Martial, 1951, which declares that "a conviction cannot be based" upon the "uncorroborated testimony of a purported accomplice," when such testimony was "self-contradictory, uncertain or improbable." The conviction of Juhl was so based. In our opinion, the Congress in substance has declared that such a conviction would be fundamentally unfair. Therefore, it is exposed to collateral attack notwithstanding the statutory provisions for finality in 10 U.S.C. Sec. 876, Article 76 of the Act of May 5, 1950, Public Law 506, 81st Cong., 64 Stat. 108. This conclusion makes it unnecessary to consider other grounds the plaintiff relies on, and we do not do so.

To explain the basis of our conclusion it is necessary to consider the facts in some detail. We do not weigh the

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* This case was referred to Trial Commissioner C. Murray Bernhardt who submitted a proposed opinion, findings of fact, and a recommended conclusion of law, pursuant to the order of reference and Rule 57(a). We acknowledge great assistance from the proposed opinion but we reach the same result by a different route. We agree with the conclusion of law and adopt it as our own. We adopt the findings of fact with minor revisions, omitting, however, those that relate to the contents of *ex parte* affidavits before the Board for Correction of Military Records.

evidence in order to determine guilt or innocence but simply recite it to determine whether it includes anything that supports the result, within the rule referred to above.

The plaintiff before his conviction had the rank of Master Sergeant. His record included 22 years service in the armed forces and he had several decorations for bravery in action. He was an air policeman, apparently the equivalent of a military policeman in the Army. He was stationed at the R.A.F. air base in Lakenheath, England, which was at that time in use by the United States Air Force as an operating base. He had a number of air policemen serving under his command, including the purported accomplices subsequently mentioned.

The Air Force, like the other armed services, maintains exchanges on its bases on foreign territory where uniformed personnel and their dependents may purchase consumer articles, free of taxes and customs duties of every kind, including those of the United States and of the host country. This is an important fringe benefit, particularly for persons stationed in the United Kingdom, where the local taxes and duties on such articles as tobacco products and liquor are stiff. To avoid abusing the hospitality of the host country it was necessary for the Air Force to make certain that excessive quantities of AFEX (Air Force Exchange) merchandise did not find their way into the United Kingdom economy. To accomplish this, local Air Force regulations limited each airman and each dependent, e.g., to a quota of 4 cartons of cigarettes a month, with like quotas on other tobacco products and liquor. Each serviceman and each dependent had a ration card issued, which had to be stamped and punched by the salesgirl at the AFEX on each purchase to show by how much the monthly quota was depleted. All personnel were forbidden to possess AFEX merchandise in excess of reasonable quantities, or to barter or sell such merchandise to persons not having such privileges. There was apparently no provision against giving AFEX merchandise away, and in light of this, the standards as to what quantities were reasonable to possess, at one time, were not clear. Apparently, it was, at least tacitly, permitted for persons having exchange privileges to purchase with other persons'

ration cards as well as their own, purportedly to turn over the purchases so made to such other persons.

About June 1961 an informant, whose name does not appear in the case, disclosed to the Air Force that airmen were purchasing excessive quantities of AFEX merchandise and selling it to British civilians, at advances in price; in other words, they were maintaining a black market. Investigation soon implicated many persons, among whom were air policemen who should have been enforcing the law. Three persons in all informed against the plaintiff, of whom two were the purported accomplices who afterwards testified against him, and one testified but in his favor. Some of the accused airmen were tried and convicted by the British for offenses against their customs laws, and as to others, including plaintiff, the British executed a waiver which, in effect, surrendered them to their own Service for trial and punishment. Plaintiff's two purported accomplices, Airmen Shields and Hughes, were both already convicted and in custody when plaintiff was tried.

The charges and specifications served upon plaintiff in accordance with military procedure are set forth in full in the findings. Two of the specifications named Airman Shields as an accomplice. The evidence of these specifications was given to the Court Martial by Airman Shields and apparently was not convincing, as the tribunal acquitted plaintiff on these specifications. Therefore, they need not be considered further. Sheilds also gave, what might be called consciousness of guilt evidence, namely, an effort by plaintiff to get him to alter his testimony. Doubtless the Court Martial considered this as relating only to the specifications under which Shields was the accomplice.

The tribunal also acquitted the plaintiff of two other specifications where Airman Hughes was the purported accomplice. These included specifications that plaintiff purchased 6 transistor radios, in excess of reasonable amounts, and that he sold Air Force merchandise—two cartons of cigarettes—to an English civilian, a Charles R. Cox, who did not have exchange privileges.

The Court Martial convicted plaintiff of the remaining six specifications. It will be convenient first to consider specification 4 which charged him with acquiring cartons

of cigarettes and boxes of cigars at the AFEX in an irregular manner. Hughes testified that he introduced plaintiff to certain British female employees of AFEX who thereafter, in his presence, contributed to plaintiff's making irregular purchases by not punching his ration card or, if someone was looking on, by punching through a hole that was already punched. The Air Force had written statements by both of the females which in general supported this charge. However, on the stand they testified they had made irregular sales to Hughes only, not plaintiff, and when plaintiff purchased in apparently large quantities, it was due to his presenting other persons' ration cards as well as his own. They explained the prior statements as due to pressure by investigators and fear of losing their jobs. They had lost their jobs anyway at the time of plaintiff's trial. The written statements were not received in evidence. It is clear that their evidence did not corroborate that of Hughes, unless contradiction is conceived to be corroboration.

Specification 7 stated that plaintiff, in conjunction with Hughes, transported 50 boxes of exchange cigars, in excess of reasonable amounts, between the Lakenheath base and Brandon, Suffolk, England. The testimony was as follows: Hughes testified that he and plaintiff traveled together, in a Volkswagen, owned by another airman, to a certain Airman Squire's home at Brandon, because Squire had told him that he had a customer who would buy the cigars. At Squire's home, Hughes and Squire removed the boxes from the boot or trunk (which, of course, in a Volkswagen is in front). At the preliminary investigation under Article 32 of the Code, Hughes testified that plaintiff remained in the front seat of the car or stood beside it during the unloading. At the trial he testified that plaintiff acted as look-out on the road to be sure that no one surprised them. Plaintiff testified in his own behalf that he made the trip as alleged but knew and saw nothing of any contraband being in the car. Upon arrival at Squire's home he said he went to the front yard and sat with Mrs. Squire (it was June) having a drink of beer. He said that he could not possibly have seen anything coming on the road from where he was sitting. Squire

testified for the prosecution but nevertheless stated that the arrangement to bring him the cigars was made with Hughes and the appearance of plaintiff surprised him; that he and Hughes unloaded the cigars from the car; that plaintiff sat, during that time, in the front yard with Mrs. Squire; and that plaintiff was in a position where he could not see the car or act as a look-out. A few days afterwards Squire heard of the investigation and threw away the cigars on a public road, so that they would not be found in his possession. He said nothing to implicate Juhl beyond his mere presence. There was no material variation in plaintiff's story and Squire's and nothing significant was brought out on cross-examination of plaintiff respecting this specification. Mrs. Squire did not testify; an affidavit she furnished later indicates she would not have corroborated Hughes if she had testified. When, as here, an accused testifies in his own behalf, he may of course, inadvertently corroborate the accomplice or make admissions that furnish corroboration. Nothing of the sort happened in this case.

Specification 3 charged that plaintiff, in conjunction with Hughes, sold 140 boxes of Air Force Exchange cigars to a person, not having exchange privileges, at Southend, Essex, England. Hughes testified to the occurrence of two transactions that would meet this description. He said an Airman Wainwright gave him a number to call at Southend, although in the preliminary investigation he had said that plaintiff had given it to him. Eventually he settled for the version that he and plaintiff jointly together got the number from Wainwright. Wainwright did not testify. He furnished an affidavit later which denied he ever gave a telephone number for such a purpose to anyone. After Hughes had called the number, on a Friday night, the next day, he testified, he and plaintiff drove in his Volkswagen to Southend, met their contact at a parking lot and went with him to a structure used by a dairy as a garage for milk trucks. There they transferred the cigars and received payment. The purchaser was not identified and did not testify. Obviously, the occurrence of this incident stands on the authority of the accomplice Hughes' testimony alone. Plaintiff denied that he participated in any such trip or transaction.

We now come to the most curious part of the case, the Southend trip of about a week later, June 17th. This time there were several others in the party and two cars were used. Hughes and his wife went ahead in his Volkswagen, taking their two dogs. (The dogs had been his daughters in the Article 32 investigation.) Plaintiff drove his car, a Chevrolet, and carried with him Mrs. Juhl, their four sons and an Airman Herron, in whose quarters the contraband had been kept the night before, so Hughes testified. The cigars, he said, travelled to Southend in plaintiff's trunk, or boot, under a blanket. Varying what he said at the Article 32 investigation, Hughes now said they had 20 transistor radios too. The whole party stopped on the way to Southend at an antique shop in a place called Sudbury, where they purchased a Life of Christ and two snake like candle holders with sharp points. They then continued to Southend where both cars stopped near a Chinese restaurant. According to Hughes, the two women took the children and the dogs into the restaurant. Plaintiff, Herron and he then travelled in plaintiff's car to the dairy garage, delivered the cigars, were paid, and returned to the restaurant. Plaintiff went in waving a big wad of English currency and handed some of it over to Mrs. Juhl. The ladies then went shopping and the men took the children to an amusement park. Southend is on the water and is a common resort for holiday making Londoners. In the late afternoon or evening they returned to the Base and had a snack there for supper. Plaintiff denied going to the dairy garage or anywhere else in his car after leaving the ladies at the restaurant. He said that the purpose for separating before lunch was so that Hughes could walk the dogs, and that two of the boys were with them. After they had joined the ladies in the restaurant he gave Mrs. Juhl five pounds ($14.00) for shopping. Mrs. Juhl testified for the defense and supported her husband's version. The boys did not testify.

There was ample reason in the evidence to surmise that both Hughes' had an interest in obtaining a conviction. He had already been tried by Court Martial and sentenced, but by some contriving he was kept on the Base to do light office work, instead of the hard labor his sentence called

for. He had been released from custody for Christmas. The inference was inescapable that the continued leniency of his future treatment was likely to be contingent on the conviction of his alleged accomplices. Under these circumstances, naturally, attention focuses on Airman Herron as the only disinterested adult, admitted by Hughes not to be a participant in the sale, even though Hughes had him providing stowage for the contraband the night before, and coming with them to the garage. Herron had been returned to a base in the United States shortly after this Southend trip. He had had correspondence with the defense and defense counsel, and the OSI had interviewed him. The defense requested that he be returned to Lakenheath as a defense witness and the Air Force ordered him there. He arrived in London one evening, was met by two representatives of the prosecution, and interviewed at length and until late. The following day he went on the stand. It was clear, therefore, that he would have had little or no opportunity to concert a story with the accused, plaintiff here, except by the risky method of written correspondence. He said he knew nothing of any contraband. His testimony affirmed the plaintiff in every detail and contradicted Hughes in every respect where his story differed from plaintiff's. He said that after the party had left Sudbury the children started playing with the candle holders. This their parents thought might be dangerous because of the spike points, so they stopped the car and Herron opened the trunk and put the candle holders in it. He saw no boxes of cigars and nothing was covered up by a blanket. So far as he was aware the trip was entirely what it purported to be, an innocent family outing.

Mrs. Hughes was put on the stand for rebuttal after the defense rested. Her story was partly favorable to plaintiff, in that he did not wave his English currency around when entering the restaurant as if bragging of a financial coup. Rather, he simply pulled a roll out of his pocket while seated, apparently, when Mrs. Juhl asked for money. (The Juhls' said they got English currency at the Base, and their purchases at Sudbury confirm they must have had some then.) One statement of Mrs. Hughes', ironically brought out by defense cross-examination, is the

nearest thing to corroboration of Hughes the case affords. She said that when she was with Mrs. Juhl in the Chinese restaurant, before the men joined them, for some reason she looked out on the street and the plaintiff's car was gone. According to plaintiff and Herron, the car was not moved. She was, however, then or recently a German national and her mastery of English was imperfect. It was not clear whether the car had really been moved from where she had seen it parked or whether she had been uncertain as to its original location. There is no more dangerous witness than a foreign national whose English is only just good enough for him or her to be denied the help of an interpreter. The Law Officer made it of record (R 426) that she had difficulty understanding and was difficult to understand.

However, her testimony suffers from a more dramatic infirmity. It was brought out on cross-examination that she was living near the Base and when an air policeman went to pick her up to testify, Airman Hughes was with him. The policeman, Sergeant Stedley, overheard enough of the ensuing conversation and repeated it, to make it perfectly clear to us that Airman Hughes, in the guise of questioning her about her recollection of the Southend trip, was actually coaching her as to what to say. At the conclusion of Airman Hughes' testimony in Juhl's Court Martial the legal officer (*i.e.*, the judge) had given him the following instructions:

> LO: Airman Hughes, you are excused but subject to being recalled as a witness. You are instructed not to discuss your testimony in this case with anyone except counsel or the accused. You will not allow any witness in this case to talk to you about the testimony which he has given or which he intends to give. If any one other than counsel, these two captains here—
>
> WITNESS: Right, sir.
>
> LO: —or the accused even attempts to talk to you about this case or about your testimony in this case, you should make the circumstances known to Captain Lee. (Captain Lee was the prosecutor.)

While there is no evidence that the prosecution ordered this flagrant violation of the court's instructions, it was in

a position to see to it that they were observed, since Hughes was in custody, and manifestly it should have done so. Considering all the circumstances, we feel compelled to regard Mrs. Hughes' testimony as utterly devoid of probative value, at least as evidence for corroboration of Airman Hughes' testimony, since it is really Airman Hughes' testimony through another's mouth.

As in the case of Shields, Hughes testified to some statements by plaintiff possibly indicative of consciousness of guilt, but Juhl denied making such statements and they were not overheard by any impartial persons.

There were three other specifications not already mentioned, but the evidence to prove them was only the acts and transactions already described. Charge I, Specification 1 was conspiracy; Charge II, Specification 2 was for possession of Air Force Exchange merchandise, 140 boxes of cigars, in excess of reasonable amounts. This was apparently the same merchandise which plaintiff was charged with having sold in Specification 3. Charge II, Specification 9 was for dereliction in the performance of duties as non-commissioned officer in charge, in that plaintiff knew of black market activities by his subordinates and wilfully failed to apprehend them or report them. There was no evidence of plaintiff having such knowledge, except in the instances already described and those of which he was acquitted.

The requirement of corroboration does not mean that the corroborating evidence should cover every element of the offense so as to be sufficient for conviction apart from the accomplice's testimony. *Christy* v. *United States*, 261 F. 2d 357 (9th Cir. 1958), *cert. denied* 360 U.S. 919 (1959). In the circumstances, it should not consist merely of indifferent facts, but should in some manner connect the accused with the offense. *Arnold* v. *United States*, 94 F. 2d 499, 507 (10th Cir., 1938); *Keliher* v. *United States*, 193 F. 8, 15-16 (1st Cir., 1912); *United States* v. *Howell*, 56 F. 21, 39 (W.D. Mo., 1892), *appeal dismissed*, 163 U.S. 690 (1896).

Corroboration cannot be found in the mere presence of the accused near the scene of the crime. *People* v. *Mullens*, 292 N.Y. 408, 416, 55 N.E. 2d 479, 482, motion denied, 293 N.Y. 768, 57 N.E. 2d 845 (1944); *O'Quinn* v. *State*, 43 Okla. Crim. 372, 279 P. 358 (1929). In the

Brandon transaction there was corroboration that a crime was committed. The accused was admittedly near the scene of that crime, but his presence had an explanation consistent with innocence. If, *e.g.*, the car in the Brandon transaction had carried illicit heroin, corroboration might arguably be found—as the Government argues—in what might be thought the unlikelihood that the admitted offenders would allow anyone not having complicity to be or to travel with them during commission of the offense, with all the risk of exposing the crime accidently. Here, however, Hughes clearly did not see the cigars as dangerous in that way, as shown by his taking a non-participant (admitted by him to be such) with him in the second Southend transaction. In the absence of other corroboration, it cannot therefore be found in Juhl's merely being near the cigars, which he said he was not aware of and did not see.

In the second Southend transaction, Juhl's story and Hughes', as we have seen, differed more widely. If Juhl told the truth, he did not deliver any contraband and neither did Hughes. No crime was committed. Conceding arguendo that corroboration might be found in any instance, however, minute, where testimony of others, or circumstances, confirmed Hughes' version and refuted Juhl's, there was no such instance except the tainted testimony of Mrs. Hughes. There was no corroboration that a crime was committed, still less that Juhl participated in committing it.

We have also considered whether Airman Hughes' testimony was self-contradictory and are of the view it was so beyond all doubt. When first suspected, Hughes was interviewed by the OSI officers and denied all participation in black market activities. Later, on the 18th of July, he gave a statement to a Captain Miller in which he admitted black market activities on a large scale and implicated numerous persons, including plaintiff. At his Court Martial he again denied all participation in black market activities and claimed that his statement to Captain Miller had been obtained by improper coercion. At plaintiff's Court Martial Hughes blandly agreed that what he then testified to was entirely contrary to what he had said at

his own trial, and he explained the latter as having been on the advice of some unnamed British lawyers. It is not clear whether these lawyers advised him to testify contrary to the truth or whether they based their advice on Hughes' own statements to them. If, however, it is thought that self-contradiction must be found within the four corners of the same proceeding, it should be noted that the proceeding in this, as in other Courts Martial, includes a preliminary investigation under Article 32 of the Code in which witnesses testify under oath. This is a discovery proceeding and the right of an accused to rely on any conflict between prosecution testimony there and at the trial is manifestly intended. There are in this case very important contradictions between Hughes' testimony in plaintiff's Article 32 investigation and that in plaintiff's trial. Thus there is contradiction whether the plaintiff Juhi or Airman Wainwright was the source from whom Hughes obtained the Southend contact's telephone number. There is self-contradiction as to whether they carried transistor radios as well as cigars on the second Southend trip. In his testimony about the Brandon trip there is self-contradiction whether the plaintiff sat in the car while the contraband was unloaded or acted outside it as a look-out. Squire's own testimony at the preliminary investigation had plaintiff out of and away from the car and that is undoubtedly why Hughes changed his version. It would appear, however, that if a person contradicts himself—anything he ever said—in his trial testimony, that testimony is self-contradictory. In ordinary speech the fact that a person contradicts himself is not limited as to time or transaction and there is nothing to show the requirement of the Manual with respect to self-contradiction was not intended to be understood as it would be understood in ordinary speech. In *United States* v. *Haderlein*, 118 F. Supp. 346 (N.D. Ill., 1953), the testimony of an alleged accomplice was held to be self-contradictory by reason of conflicting testimony previously given under oath before a grand jury.

The Government cites the statement of a Board of Review in *United States* v. *Jones*, 15 CMR 664, 671 (1954), to the effect that testimony is not "self-contradictory" if

the inconsistency is with statements made prior to the trial and the trial testimony itself is consistent; such prior statements are to be considered only in assessing the witness' credibility. The Board of Review cites no authority for this position. If it is valid, we believe its validity is limited to the case before the Board where, unlike the one at bar, the witness, in his testimony, does not expressly refer to his former statements and then expressly contradict them, that is, when one would have to go outside the witness' trial testimony itself to determine that he had contradicted himself. In any event, the Board of Review found no *significant* inconsistency in the testimony before it. It characterized the statements in question as "*minor* inconsistencies as to dates, places and circumstances pertaining to the offenses charged," *ibid.*, and said that the witnesses themselves had explained the inconsistencies away. In the case at bar that was not so. Here, as in *Haderlein, supra,* and unlike *Jones,* the utter inconsistencies of Hughes' prior sworn testimony was exposed and blithely admitted in Hughes' testimony at Juhl's trial itself. Other than *Jones,* no case pertinent to this issue has been cited to us. (Emphasis supplied.)

In a Military Court the function of the Law Officer, vis-a-vis the rest of the Court, much resembles that of the Judge in a civilian trial, vis-a-vis the jury. He admits or excludes evidence and instructs the president and other members of the court on the law just as a judge would do. The record in this case includes a conference about instructions between the Law Officer and counsel, out of the hearing of the rest of the court. The following colloquy occurred:

> LO: It's my understanding, now, that the accused does not want instruction on accomplice testimony.
>
> DC: That is correct, sir. This was not the theory of the defense.

Defense counsel had, of course, laid great stress on impeaching the purported accomplices, Hughes and Shields, and apparently saw some inconsistency between his approach to the case and the instruction, whatever it was,

that the Law Officer would have given. Defense counsel knew his way around court martials and his resourcefulness and zeal in behalf of his client were worthy of praise. Therefore, it is necessary to suppose he had in mind a purpose or reason the record now before us does not disclose. Apparently he had had an unrecorded conference with the Law Officer on the same subject. The record reflects a conscientious effort by the Law Officer to protect the rights of the accused and doubtless he would have delivered, if requested, an instruction built around Section 158a, only unfortunately he acquiesced in the theory that it was not required in the plaintiff's interest.

After the conviction of the plaintiff, as indicated, on 6 of the 10 Specifications, the Court Martial proceeded in due course to impose sentence which was that the accused would be reduced to the grade of airman basic, would forfeit $55.00 a month, and would be confined at hard labor for 6 months. He actually forfeited $43.00 per month, but he served most of the 6 months at hard labor.

The record before us includes an extended review of the case by a Staff Judge Advocate which was the nearest thing to appellate procedure that the plaintiff had a right to, or actually had. With regard to the accomplice rule all he says is the following:

> I note that no instruction on accomplice testimony was given. In view of the other instructions and the issues that were clearly drawn for the court's decision, no such instruction was necessary. Further, the defense specifically declined it (R. 454). The accused was not prejudiced by the fact that the instruction wasn't given.

It would appear to have been the position of the Staff Judge Advocate that the lack of instruction on accomplices was not prejudicial in view of the extended instructions on impeachment. The main thrust of the effort of defense counsel was to impeach the accomplice witnesses, Hughes and Shields. However, the absence of prejudice to the accused is by no means as apparent to us. The purport of the accomplice rule is that a conviction upon the uncorroborated testimony of an accomplice, if the said testimony is "self-contradictory, uncertain or improbable," is not

allowed. The effect of Hughes' self-contradictory statements, considered merely as impeachment, was that the triers of facts could choose whether or not to believe what he said before them, *i.e.*, they could decide whether the witness was, in fact, impeached or not (R 459, 468). The effect of the accomplice rule would seem to be that in a case covered by the rule the determination of guilt would have to be taken away from the fact-finders and they could not render a verdict of guilty whether they believed Hughes was telling the truth now or had told it before.

That is one reason why in this case counsel's refusal of an instruction on accomplice testimony did not constitute a waiver of the point. If, as we hold, judgment in favor of the plaintiff should have been directed by the law officer on this ground, there was no need or place for an instruction which would have left it up to the court-martial members to decide for themselves whether or not Hughes' testimony was corroborated and if not whether or not it was "self-contradictory, uncertain, or improbable." Under our view of the case these were not issues to be given to the fact-finders. Neither plaintiff or his counsel ever indicated that they were deliberately waiving application of the accomplice rule by the law officer.

The appellate review within the military system does not appear to have been such as to require us to keep hands off under the standards set forth in *Burns* v. *Wilson*, 346 U.S. 137, 144 (1953), that is, that we would be going over matters they have fully considered.

In case of mere error, in admitting or excluding evidence or instructing a jury, the failure of counsel to object of course has the normal consequence of barring even a direct appellate reversal, and this holds good as to collateral attack on a court martial when the ground of attack is failure to give full and fair consideration to procedural safe-guards deemed essential to a fair trial. *Bennett* v. *Davis*, 267 F. 2d 15 (10th Cir., 1959). The rationale is that the tribunal cannot be said to have "refused to consider" a point not urged. Bishop, *Civilian Judges and Military Justice: Collateral Review Of Court-Martial Convictions*, 61 Col. L.R. 40, 62 (1961). Here, however, the defect is, we believe, jurisdictional on other grounds,

as we will show, and the normal rule applies that a jurisdictional defect cannot be cured by waiver. *McClaughry* v. *Deming*, 186 U.S. 49, 66 (1902).

For full understanding the accomplice rule should be considered in context and for this reason we attach the whole of Section 153a of the Manual to this opinion as Exhibit A.

The plaintiff applied to the Air Force Board For Correction of Military Records, after the completion of standard military review procedures. The Board considered evidence against the plaintiff which the Court Martial had excluded as illegally acquired, namely plaintiff's ration card exhibiting irregular punches which may or may not have been over-punches. On the other hand, it also received various affidavits on behalf of plaintiff which purported to amplify, vary, or explain the evidence at the trial, along the lines of plaintiff's contentions. The decision of the Board was adverse to the plaintiff, but it did not make part of the record any indication of how it evaluated the original or new evidence, or what its reasons were. In the circumstances, we cannot given the Board decision weight against the plaintiff here, or accept it as the previously unprovided appellate review. Plaintiff in argument called attention to the cases in which we have overturned Board decisions which we have found arbitrary, capricious, or not supported by substantial evidence. The argument seemed to be, along the lines of *Ashe* v. *McNamara*, 355 F. 2d 277 (1st Cir., 1965), that this judicial power in some manner overrides the finality language of the Uniform Code of Military Justice, 10 U.S.C. 876. We consider later what effect this finality language has on the scope of our review of the Court Martial itself. Suffice it to say at this point we do not think the finality, whatever it is, is either enhanced or diminished by the Board proceedings. The case stands before us exactly as if plaintiff had never gone to the Board. It is not arbitrary and capricious, in the absence of unusual circumstances not here present, to consider *ex parte* affidavits of less weight than testimony taken subject to cross-examination.

We have now determined that Section 153a of the Manual For Courts Martial, 1951, provides that no person may

be convicted on the uncorroborated testimony of an accomplice if such testimony is self-contradictory. We have further established that the plaintiff Juhl was convicted on the uncorroborated testimony of a purported accomplice. We have further established that the testimony of the purported accomplice was self-contradictory. We have noted that counsel did not request and the Law Officer did not give instruction on this accomplice rule. What remains to be determined is what effect we can give to the foregoing in view of the provision in 10 U.S.C. 876, that the determination of courts martial under the Code of Military Justice shall be final and not subject to question in any court except the courts set up by the Code itself.

Our recent decision in *Augenblick* v. *United States*, 180 Ct. Cl. 377 F. 2d 586 (1967), takes us part of the way by demonstrating that the Congress clearly indicated in the legislative history that it did not intend to reduce or enlarge the traditional limited collateral attack on courts martial in habeas corpus proceedings, and further, inasmuch as back pay suits in this court had enjoyed equality with habeas corpus as a means of collateral attack almost ever since the first existence of this court, the Congress could not have intended, the legislation not mentioning either, to abolish one and not the other. The reference to habeas corpus in the legislative history must have been demonstrative and not exclusionary. There is, of course, nothing unheard of in statutory finality language not having in court proceedings its exact literal effect. *Ashe* v. *McNamara*, *supra*, at 281, and cases cited. Therefore, we reiterate that whatever scope of review would be proper, in view of the finality language, in a habeas corpus proceeding, is equally appropriate in a suit in this court for back pay.

The Manual for Courts Martial is not an ordinary handbook. The Uniform Code of Military Justice, *supra*, Article 36, *supra*, reads in part as follows:

> The procedure, including modes of proof, in cases before courts-martial, * * * may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of

> criminal cases in the United States district courts, * * *

All regulations under this authority were to be reported to Congress. President Truman by Executive Order 10214, 8 CFR, 1949-1953 Comp., p. 408, invoking this authority, promulgated and prescribed the Manual referred to. There can be no doubt he had in mind that failure to comply with regulations might render a proceeding invalid because there is a clause in the order which reads as follows:

> * * * Provided, That nothing contained in this manual shall be construed to invalidate any investigation, trial in which arraignment has been had, or other action begun prior to May 31, 1951; * * *

The Congress had in mind that failure to comply with some other provisions of the Uniform Code would or might be a basis of collateral attack, for it expressly declared that failure to follow Article 32 (Investigation), 10 U.S.C. § 832, "does not constitute jurisdictional error." 10 U.S.C. § 832(d).

The manual is a lengthy and formidable document and it would boggle the imagination to suppose that a court martial should be totally invalid for failure to comply with any part of any provision. However, few provisions contain language as strong as the accomplice provision here under consideration. That is, few provisions say as this one does that "a conviction cannot be based" on procedure not in compliance with the rule stated. This appears to indicate plainly that power to convict in violation of this rule is not granted. It is not a mere rule of evidence or procedure.

Duly authorized regulations for the conduct of court martials have the force of law. *Ex parte Reed*, 100 U.S. 13, 22 (1879). Counsel referred to the accomplice rule as a "statute" in oral argument and the deviation from strict accuracy was immaterial.

Collateral attacks in civilian courts upon court martials have been common for over 100 years in our jurisprudence, and it is important now to consider the effect in

such a collateral attack of a violation by a court martial of a statute fashioned to govern its procedure.

It is a commonplace that the historic attitude of United States civilian courts was that they could not review court martial proceedings for legal error, but only for lack of jurisdiction. *Carter* v. *Roberts*, 177 U.S. 496, 498 (1900); *Swaim* v. *United States*, 165 U.S. 553, 561 (1897); *Collins* v. *McDonald*, 258 U.S. 416, 418 (1922); *Carter* v. *McClaughry*, 183 U.S. 365, 381 (1902); *In re Grimley*, 137 U.S. 147, 150 (1890); *Hiatt* v. *Brown*, 339 U.S. 103, 111 (1950); *United States* v. *Fletcher*, 148 U.S. 84, 92 (1893). In *Collins* v. *McDonald*, *supra*, at 420-21, it was held that the admission, by a court martial, of a confession obtained by duress, was a mere error in admission of testimony which could not be reviewed on habeas corpus, when the accused made no reference to the record to support the assertion of duress. *Hiatt* v. *Brown*, is a particularly interesting illustration of the general rule and had the concurrence of all the justices who participated, an unusual circumstance in Supreme Court cases dealing with courts martial at that period. The Fifth Circuit below, 175 F. 2d 273 (1949), had held that the conviction was unconstitutional as contrary to due process because of a group of errors which the court basketed to add up to a constitutional deprivation. The errors were as follows:

> "(1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.
>
> "(2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.
>
> "(3) The record reveals that the law member appointed was grossly incompetent.
>
> "(4) There was no pre-trial investigation whatever upon the charge of murder.
>
> "(5) The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense.

> "(6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law." 175 F. 2d at 277.

The Supreme Court said at p. 111:

> It is well settled that "by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings. * * *. The single inquiry, the test, is jurisdiction." * * *. In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful *powers*. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision. * * *. (Emphasis supplied.)

In the instant case, the mandatory corroboration requirement of § 153a, of the Manual, clearly shows Congress' intention to withhold from a court-martial the *power* to convict where that standard has not been met. The standard not having been satisfied here, the court-martial lacked the power necessary to convict the plaintiff.

There exists an ancient and respectable doctrine that a court-martial will lose its jurisdiction by failure to follow applicable statutory procedure. In *Dynes* v. *Hoover*, 20 How. (61 U.S.) 65, 81 (1857), the Court said:

> * * * When [the court martial sentence is] confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the *subject-matter or charge*, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. * * *

The Court had previously indicated, at p. 80, that the court martial is a kind of inferior court and where it "has jurisdiction over the subject-matter, *but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered coram non judice,*" a proper method of collateral attack was a personal action

against the officer who executed the process of the tribunal.

In *Runkle* v. *United States*, 122 U.S. 543, 556 (1887), the Court said:

> To give effect to its [a court martial's] sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law.

In *McClaughry* v. *Deming*, *supra*, at p. 63, the Court said:

> "A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev. sec. 470; *Brooks* v. *Adams*, 11 Pick 441, 442; *Mills* v. *Martin*, *supra*; *Duffield* v. *Smith*, 3 S. & R. 590, 599. Such, also, is the effect of the decision of this court, in *Wise* v. *Withers*, 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 209, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes* v. *Hoover*, 20 How. 65, 80; *Mills* v. *Martin*, 19 Johns. 33. There are no presumptions in its favor, so far as these matters are concerned. * * *."

It is true that among these early cases, instances are not often found of successful collateral attack by reason of violation of applicable statutory regulations. However, in *Smith* v. *United States*, 38 Ct. Cl. 257 (1903), we held, citing *Runkle* v. *United States*, *supra*, in a back pay suit

that the court martial was void because, contrary to a statutory requirement, the accused had not been served with a copy of the charges and specifications upon his first arrest. The Supreme Court reversed at 197 U.S. 386 (1905), but upon the ground that we misconstrued the statute. It expressly passed over the jurisdiction issue. It would seem the case stands as a valid precedent in this court on the jurisdictional question, the reversal having been on other grounds. In *Mullan* v. *United States*, 42 Ct. Cl. 157 (1907), aff'd. 212 U.S. 516 (1909), we said (at p. 177) (concerning a statute requiring court-martials to confront the accused with the witnesses against him, which right he had waived):

> The statute in question is not in any manner a limitation upon the jurisdiction of the court-martial. The authority of the tribunal is not prescribed by its terms. It is merely a legal regulation as to its proceedings securing certain rights to the accused, which in the absence of an express waiver upon his part, must be accorded him by the tribunal or *subject their findings or sentence to collateral attack in civil courts*, and as such we have treated it. * * * (Emphasis supplied.)

In *Humphrey* v. *Smith*, 336 U.S. 695 (1949), the Court held that failure to conduct a proper pre-trial preliminary investigation did not go to the jurisdiction when the trial itself was fair. Three judges dissented and would have held that the ommission of a proper statutory preliminary investigation was jurisdictional. It would appear a reasonable inference from the conclusion of the majority that they would have seen the defective procedure as jurisdictional if they had thought it tainted the fairness of the trial itself. Article 32 of the Uniform Code, 10 U.S.C. 832, now expressly declares that this kind of error shall not be jurisdictional.

From the cases up to that point the Congress and the President might well have been on notice that any regulations issued under Article 36, *supra*, might be held to prescribe procedure which or some of which would have to be complied with for the court martial to stand up against

collateral attack. The paucity of instances under previous law of successful attack on the ground of failure to comply with a statute or a Presidential regulation might have been deemed attributable to the fact that such statutory procedures were few and simple and were not burdensome to comply with.

The challenge of a court martial for failure to follow a statute fashioned to govern it thus would seem to have better historic foundation than its challenge on merely constitutional grounds. Only in 1947 had come *Shapiro* v. *United States*, 107 Ct. Cl. 650, 69 F. Supp. 205, which seems to have been somewhat of an innovation as the first successful collateral attack on a court martial for breach of the Bill of Rights. In *Burns* v. *Wilson*, *supra*, Mr. Justice Frankfurter refers to the case in a separate comment at pps. 844 and 847 of the same volume and laments that it was not called to the Supreme Court's attention by the parties in their briefs. The Justices in the latter case went off in different directions and no opinion commanded the support of a majority. Mr. Justice Minton invoked the old rule limiting collateral attack to jurisdictional issues, citing *In re Grimley*, *supra*, and *Hiatt* v. *Brown*, *supra*, but failed to note how *Grimley* was, among the older cases, representative of one side of the range and not the median. The opinion of the Court, so called, per Mr. Chief Justice Vinson, sustaining the court martial, pronounced doctrines which in a way may be considered to have started a new line of jurisprudence. They point out the separate nature of military law, the need of the military for strict discipline, and the fact that civilian courts lacked supervisory powers in the field. They expressed the view that the habeas corpus jurisdiction was less than that over civilian courts. They looked hopefully at the prospects of the new Uniform Code of Military Justice. They pointed out the finality provision in the Code, but expressed the opinion that it did not relieve the civilian courts of the duty to take corrective action in cases of fundamental unfairness and violations of the constitution. However, the civilian courts should not reweigh issues which military courts have dealt with fairly and fully.

Mr. Justice Frankfurter thought the case should be reargued. Mr. Justice Jackson concurred in the result and two Justices dissented.

Succeeding decisions in this court, *Shaw* v. *United States*, 174 Ct. Cl. 899, 357 F. 2d 949 (1966), and *Augenblick*, *supra*, have developed the themes of constitutional deprivation and fundamental unfairness. Nothing in these cases should be taken as authority that a constitutional deprivation has to be found to maintain a collateral attack, when such an attack would have been maintainable without constitutional grounds before 1950. *Augenblick*, involved a violation of the Jencks Act which is of general application. There may be a valid distinction between statutes of general application and those fashioned directly for courts martial. At any rate, we found a constitutional issue in *Augenblick*, so we placed the case in the mainstream of these recent decisions.

Express statutory provisions to assure fairness in court martials were long the only "bill of rights" an accused soldier could rely on. Only later, much later, did it become possible to him to invoke the constitutional Bill of Rights on matters wherein the statutes were silent. It is entirely logical and consistent therefore, when the text and context of the statute permits, that in a collateral attack breach of such an express statutory provision has the same legal consequence as breach of the constitutional bill of rights does when the statute is silent.

The Manual's accomplice rule, which we apply here, goes to the basic fairness of the trial in that it deals with the existence of any probative evidence sustaining the conviction. To assure that convictions stand upon truly probative evidence, the President has directed that "a conviction cannot be based" on a record failing to meet the accomplice rule. In its relation to fundamental fairness, this rule is similar, and serves a parallel purpose, to the constitutional rule that the due process clause invalidates a conviction rested on no evidence at all. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965).

Since his conviction was thus invalid, plaintiff is entitled to recover back pay and allowances, less appropriate off-

sets, from the date on which the pay and allowances were withheld to the date of judgment. Judgment is entered for plaintiff to that effect. The amount of recovery will be determined under Rule 47(c).

FINDINGS OF FACT

The court having considered the evidence, the report of Trial Commissioner C. Murray Bernhardt, and the briefs and arguments of counsel, makes findings of fact as follows:

I—PRETRIAL

1. Discovery and scope of black-marketing activities. Early in July 1961 the Office of Special Investigations (OSI) of the Air Force informed Captain Kenton D. Miller, commanding officer of the 48th Air Police Squadron, 48th Air Base Group, RAF Station, Lakenheath, England, that a number of his enlisted men had been engaged in the black-marketing of Air Force Exchange merchandise (principally cigarettes, cigars, liquor, and transistor radios) to unauthorized British civilians in violation of military regulations as well as the customs laws of England. In the course of his investigation of these reports Captain Miller interrogated about 60 enlisted men in his squadron and concluded that about 49 squadron personnel were involved in such prohibited activities, of whom ten were under the immediate supervision of plaintiff, who was then a master sergeant and Noncommissioned Officer in Charge (NCOIC) of Security and Law Enforcement at the base, with 25 or 30 enlisted men in his unit. As part of Captain Miller's investigation, on July 18, 1961, he interrogated Airman Basic Frank W. Hughes, who orally accused 29 men in the squadron of being involved in black-marketing. Eventually ten of these 29 men received punishment either following conviction in British courts for violations of British customs laws, or following military proceedings under Article 15 or courts-martial. Just how many of these ten men convicted were under plaintiff's direct supervision is not revealed in the record, but there were at least four. Of the 60 men interrogated by Captain Miller, three implicated the plaintiff directly. These were Airmen Hughes, Larry Ray Shields, and Wallace Dale Squire.

Plaintiff testified that until July 18, 1961, when the scandal broke, he was not aware of black-marketing activities by the airmen in his unit.

2. Plaintiff's background and character.

Plaintiff (sometimes hereafter referred to as the "accused") was born March 6, 1921, enlisted in the regular army March 8, 1939, and served as an enlisted man until January 22, 1945, when he was commissioned a second lieutenant in the Army of the United States, and so served until October 27, 1946. He reenlisted on November 14, 1946, and has continued in this enlisted status to the present time. He arrived at Lakenheath in England September 18, 1959, and served there in the rank of master sergeant as NCOIC of Security and Law Enforcement of the 48th Air Police Squadron until July 18, 1961. He was on the board of governors of the NCO Club, and an active member of the pistol team. The character of his service just prior to his court-martial conviction was officially rated as "outstanding". In addition to numerous campaign and theater ribbons, a good conduct medal, and other unit and personal decorations, he was awarded the Silver Star and Bronze Star Medal (with Oak Leaf Cluster) for gallantry and heroic action in combat in Germany during the closing stages of World War II. At his trial four master sergeants and two staff sergeants who had known plaintiff for several years testified to his good character and reputation for truth and veracity. Prior to plaintiff's involvement in the court-martial proceeding his commanding officer, Captain Miller, who had served over plaintiff for two years and knew him well, regarded him as outstanding, dependable, tough, and honest. Plaintiff was in fairly good financial condition in 1961. He owed no debts and owned two homes in the United States which were being rented out.

3. Plaintiff's initial arrest and confinement. On July 18, 1961, plaintiff was arrested without charges and confined overnight by order of Captain Miller. He was released from confinement the following day but was relieved of his duties and assigned to laboring chores on the base far below his master sergeant's rank pending investi-

gation of statements implicating him in black-marketing. He and his family, consisting of a wife and four sons, had been living off the base, but on August 11, 1961, he was required to move into quarters on the base. Thereafter until his court-martial trial ending February 2, 1962, he was assigned to unimportant duties and restricted to residence at the base.

4. **Consultation with Staff Judge Advocate.** At all material times Major (later Lieutenant Colonel) Clifford R. Carver was Staff Judge Advocate at Lakenheath. On or about August 10, 1961, plaintiff visited Major Carver to obtain advice and to ascertain the details of statements which he understood had been made by others implicating him in black-marketing activities. He did not ask Major Carver to provide counsel, and Major Carver did not volunteer that plaintiff had any right to counsel at that time. He told plaintiff that he would inform plaintiff when he should engage counsel, and that in the meantime he was not to talk to lawyer-officers on his (Carver's) staff until Carver found "which way the wind was blowing." Plaintiff told Major Carver that he did not intend to make a statement regarding the allegation implicating him in illegal activities, for his experience as an Air Policeman led him to think this to be inadvisable as a general proposition. Major Carver subsequently drafted the formal charges against plaintiff, prepared the first posttrial interview report following plaintiff's conviction by general court-martial on February 2, 1962, in which report he recommended approval of the sentence of the court-martial as adjudged, and had earlier restricted plaintiff to the base while he was under investigation as a suspect or as a material witness against others. There is no indication that Major Carver interrogated plaintiff at any time as to the facts concerning his guilt or innocence, or that he was biased against plaintiff as the latter alleged in a clemency statement which he filed on March 27, 1962, following his court-martial conviction. Major Carver certified that he had not "participated in the trial of this case [i.e., plaintiff's court-martial] as counsel, a member of the court, the accuser, as a witness, or in any other capacity of a partisan nature. My only connection with the case has been

that of Staff Judge Advocate to the Officer exercising Special Court-Martial authority over the accused."

5. Participation of Captain Lee, Trial Counsel.

Airman Hughes (*supra*, finding 1) was tried by court-martial on November 2, 1961, with Captain Richard R. Lee prosecuting the case as Trial Counsel. In late October 1961 Captain Lee called in plaintiff to confer with him as a prospective witness against Hughes; no charges had by then been served on plaintiff.

Captain Lee later prosecuted plaintiff as Trial Counsel in plaintiff's court-martial. It is not indicated that, in the conferences between Captain Lee and plaintiff, or in a conference between Captain Lee and plaintiff's wife, any admissions damaging to plaintiff or his wife were made by them which were prejudicial to plaintiff at his subsequent trial. Plaintiff did not consult Captain Lee as his attorney and Captain Lee gave him no legal advice.

6. Article 32b Investigation. Statements were obtained from prospective or potential prosecution witnesses on or about July 18, 1961. Plaintiff was arrested on that day without charges, and released the next day. Thereafter he was restricted to the base through the time of his court-martial trial ending February 2, 1962. Charges were preferred against plaintiff on November 29, 1961, with Major Edwin L. Atkins as the accuser. On November 29, 1961, an Article 32b Investigation convened attended by Lieutenant Maurice E. Hebert as Investigating Officer, the plaintiff, and a reporter. Lt. Hebert informed the plaintiff as to his rights, read the charges to him, and proffered him military counsel or selection of a counsel of his choice. Plaintiff requested Captain Ginsburg for his military counsel, and the Article 32b Investigation then recessed to December 13, 1961, to provide plaintiff an opportunity to secure the services of Captain Ginsburg as his military counsel. The Article 32b Investigation reopened December 13, 1961, attended by Lt. Hebert, a reporter, plaintiff and his defense counsel, Captain Gordon A. Ginsburg. Seven witnesses were examined by Lt. Hebert and cross-examined by Captain Ginsburg. The investigation was then closed. The plaintiff was given a delay to January 13, 1962, for further investigation. On January 3, 1962

the Article 32b Investigation was reopened and testimony was taken from additional witnesses. Formal charges were served on plaintiff on January 18, 1962. The court-martial convened January 30, 1962, and trial opened.

7. **Charges and specifications.** The charges and specification served on plaintiff on January 18, 1962, were as follows:

CHARGE I: Violation of the Uniform Code of Military Justice, Article 81.

Specification: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, on or about 25 May 1961, conspire with AIRMAN FIRST CLASS FRANK W. HUGHES to commit an offense under the Uniform Code of Military Justice, to wit: Violation of paragraph 51.1.c, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, and in order to effect the object of the conspiracy the said Sergeant Juhl and Airman Hughes transported Air Force Exchange merchandise (140 boxes of cigars) to Southend, Essex, England, during the period of 25 May 1961 to 24 June 1961.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 92.

Specification 1: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, on or about 18 May 1961, violate a lawful general regulation, to wit: paragraph 51.1.b., United States Air Forces in Europe Supplement 1 to Air Force Regulation 147.14, dated 15 November 1960, by purchasing Air Force Exchange merchandise (six transistor radios) in excess of reasonable amounts.

Specification 2: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at South-

end, Essex, England, from about 25 May 1961 to about 24 June 1961 in conjunction with AIRMAN FIRST CLASS FRANK W. HUGHES, violate a lawful general regulation, to wit: paragraph 51.1.b, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by possessing quantities of Air Force Exchange merchandise (140 boxes of cigars) in excess of reasonable amounts.

Specification 3: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Southend, Essex, England, from about 25 May 1961 to about 24 June 1961, in conjunction with AIRMAN FIRST CLASS FRANK W. HUGHES, violate a lawful general regulation, to wit: paragraph 51.1.c, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by selling Air Force Exchange merchandise (140 boxes of cigars) to a person not having exchange privileges.

Specification 4: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, from about 1 April 1961 to about 18 July 1961, violate a lawful general regulation, to wit: paragraph 51.1.h, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by wrongfully acquiring Air Force Exchange merchandise (cartons of cigarettes and boxes of cigars) in an irregular manner.

Specification 5: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Southend, Essex, England, on or about 15 July 1961, in conjunction with AIRMAN SECOND CLASS LARRY R. SHIELDS, violate a lawful general regulation, to wit: paragraph 51.1.c, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November, 1960,

by selling Air Force Exchange merchandise (64 cartons of cigarettes and 12 boxes of cigars) to a person not having exchange privileges.

Specification 6: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, on or about 14 July 1961, in conjunction with AIRMAN SECOND CLASS LARRY R. SHIELDS, violate a lawful general regulation, to wit: paragraph 14a, United States Air Forces in Europe Regulation 176-1, dated 22 April 1960, by transferring Class VI items (eight bottles of gin) to a person not authorized Class VI privileges.

Specification 7: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, on or about 15 July 1961, in conjunction with AIRMAN FIRST CLASS FRANK W. HUGHES, violate a lawful general regulation, to wit: paragraph 51.1.b, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by transporting quantities of Air Force Exchange merchandise (50 boxes of cigars) in excess of reasonable amounts between Royal Air Force Lakenheath, Suffolk, England, and Brandon, Suffolk, England.

Specification 8: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, did, at Royal Air Force Lakenheath, Suffolk, England, on or about 1 April 1961, in conjunction with AIRMAN FIRST CLASS FRANK W. HUGHES, violate a lawful general regulation, to wit: paragraph 51.1.c, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by selling Air Force Exchange merchandise (two cartons of cigarettes) to Charles R. Cox, a person not having exchange privileges.

Specification 9: In that MASTER SERGEANT KENNETH N. JUHL, United States Air Force, 48th Supply Squadron, 48th Air Base Group, at Royal Air

Force Lakenheath, Suffolk, England, from about 1 April 1961 to about 18 July 1961, was derelict in the performance of his duties as Non-Commissioned Officer in Charge, Law Enforcement Section, 48th Air Police Squadron, 48th Air Base Group, in that he had knowledge that subordinate Air Policemen under his supervision were regularly engaged in the violation of paragraph 51.1, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated 15 November 1960, by purchasing Air Force Exchange merchandise for purpose of resale and the production of income, by purchasing, possessing and transporting of quantities of Air Force Exchange merchandise in excess of reasonable amounts, by selling Air Force Exchange merchandise to persons not having Exchange privileges, and by acquiring Air Force Exchange merchandise.

II—TRIAL

8. Convening of general court-martial; motions to dismiss.

a. Immediately after the plaintiff's general court-martial convened on January 30, 1962, it recessed briefly for the Law Officer to entertain defense counsel's motions to dismiss all charges and specifications on the following three grounds:

(1) Deprivation of speedy trial.
(2) Defective charges and specifications.
(3) Violation of Canon 9 of the Canons of Ethics of the American Bar Association, in that Trial Counsel Lee (the prosecuting officer), prior to his appointment as such, interviewed the accused on matters pertaining directly to his prospective defense against charges not then preferred.

b. All motions to dismiss were overruled by the Law Officer. In presenting arguments in support of the third motion to dismiss (subparagraph (3) above), defense counsel interrogated the accused and Trial Counsel Lee out of the presence of the court-martial, and they were cross-examined.

9. Verdict and sentence.

a. After 473 pages of trial transcript of testimony and arguments taken from January 30, 1962 to February 2, 1962, the court on the latter date found the accused (plaintiff here) guilty of Charge I and Specification 1 thereunder, guilty of Charge II and Specifications 2, 3, 4, 7 and 9 thereunder, and not guilty of Specifications 1, 5, 6 and 8 of Charge II. Reference to the Charges and Specifications set forth in finding 7, *supra*, reveals that in paraphrased parlance the plaintiff was found guilty of the following:

(1) Possessing, transporting and selling, in conjunction with Airman Hughes, 140 boxes of cigars acquired from the Air Force Exchange in excess of reasonable amounts, to an unnamed unauthorized person in Southend, England, between May 25 and June 24, 1961, in violation of Articles 81 and 92, Uniform Code of Military Justice. (Specification 1 of Charge I, and Specifications 2 and 3 of Charge II).

(2) Wrongfully acquiring Air Force Exchange merchandise (cigars and cigarettes) in an irregular manner from April 1 to July 18, 1961. (Specification 1 of Charge II).

(3) Transporting, in conjunction with Hughes, 50 boxes of Air Force Exchange cigars, to Brandon, Suffolk, England, on July 15, 1961. (Specification 7 of Charge II).

(4) Dereliction of duty from April 1 to July 18, 1961, in willfully failing to apprehend and report airmen under his supervision who, with his knowledge, were black-marketing Exchange merchandise. (Specification 9 of Charge II).

b. Again in paraphrased parlance plaintiff was found not guilty of the following Specifications:

(1) Purchasing six transistor radios from the Air Force Exchange in excess of reasonable amounts on May 18, 1961. (Specification 1 of Charge II).

(2) Selling or transferring, in conjunction with Airman Shields, 64 cartons of cigarettes, 12 boxes of cigars, and eight bottles of gin (all from the Air Force Ex-

change) to unauthorized persons on July 14 and 15, 1961. (Specifications 5 and 6 of Charge II).

(3) Selling, in conjunction with Airman Hughes, two cartons of Air Force Exchange cigarettes to one Cox, on April 1, 1961. (Specification 8 of Charge II).

c. All of the foregoing Charges and Specifications rested (as expressly alleged in the Specifications themselves) on violations of various subparagraphs of paragraph 51.1, United States Air Forces in Europe Supplement 1 to Air Force Regulation 147-14, dated November 15, 1960, except that pertaining to the sale of gin (Charge II, Specification 6, of which plaintiff was found not guilty), which was alleged to violate paragraph 14a, United States Air Forces in Europe Regulation 176-1, dated April 22, 1960. The regulations were not physically in evidence, but presumably the court-martial took judicial notice of them. They were set forth on pages 1-3 of Defendant's Exhibit 1, a copy of the Advice of the Staff Judge Advocate, Third Air Force, to the General Court-Martial assigned to plaintiff's case, under date of January 18, 1962.

d. On February 2, 1962, plaintiff was sentenced by the court to reduction in rank to Airman Basic, forefeiture of $55 per month for six months, and confinement at hard labor for six months. On April 23, 1962, the sentence was approved by the convening authority with a modification reducing the forfeiture of pay to $43 per month for six months. The maximum possible sentence if plaintiff had been found guilty on all charges would have been dishonorable discharge, forfeiture of all pay and allowances, reduction to grade of Airman Basic, and confinement at hard labor for 16 years and 3 months.

e. Plaintiff remained in the Air Force after serving his sentence and was, at the time of filing his petition, a technical sergeant.

10. Testimony generally. The prosecution produced as witnesses in its case in chief Airmen Hughes, Shields and Squire, Captain Miller, and three female British civilian employees of the Air Force Exchange (Morley, Fletcher and Coleman). In rebuttal the defendant called the wife of Airman Hughes. The accused (plaintiff here) produced as fact witnesses, besides himself and his wife, six enlisted

men, and as character witnesses seven ranking noncommissioned officers.

11. Veracity, character, and motives of Airman Hughes.

a. Hughes was court-martialed and convicted November 2, 1961, for black-market activities. He was also convicted of black-market activities by a British court for violations of British customs laws. He had trafficked in black-marketing activities for three years, by his own admission. Hughes admitted that his testimony at plaintiff's court-martial conflicted with and was almost a complete denial of his testimony at his own court-martial, and admitted that he lied (but not under oath) to OSI agents interrogating him in preparation for his own court-martial. Hughes testified that plaintiff had attempted to get him to testify falsely, which plaintiff denied. Hughes denied to the OSI agents any knowledge of black-marketing activities, contrary to his testimony at plaintiff's court-martial. He testified that he had gone to Southend with plaintiff in June 1961 on a black-marketing mission, although he had testified at his own trial that it was in May 1961, a discrepancy he attributed to poor memory. Hughes said he lied deliberately at his own court-martial at the instance of his British counsel, who wrote out what he was to say and did not ask Hughes whether he was guilty. Whereas Hughes had told OSI investigators that plaintiff had given him the telephone number of a black-market outlet at Southend, he testified in plaintiff's trial that Airman Wainwright had given the telephone number to him and plaintiff. Hughes admitted having obtained a number of ration cards illegally from a Sergeant Sliwerski. Sergeant Klein testified that Hughes had bragged to him that he had made enough in the black market to pay for a $20,000 home and put $15,000 in the bank. Hughes admitted that he had received property from Airman Shields which he thought to be stolen, consisting of tools and a tool box which Hughes shipped home, after giving some tools to plaintiff (he said). In testifying that he was with plaintiff when they bought a number of transistor radios from the Air Force Exchange for illegal sale on the black-market, Hughes said that he had not mentioned this transaction previously because it had just oc-

curred to him since his own court-martial. Sergeant Klein testified that, on January 3, 1962, Hughes told him that he had testified before plaintiff's Article 32b Investigation Board, and that "They're trying to put me in a trick, but they'll never do it because I'll lie my way out of it." Captain Miller, Hughes' commanding officer, said he would believe Hughes' testimony under oath.

b. In November 1961, testified Airman Jones (who was convicted of black-marketing in a British court), Hughes told him that Sergeant Collier and Captain Miller, plaintiff's commanding officer, had threatened that if he (Hughes) did not make a statement against plaintiff he would get a five-year prison term and a dishonorable discharge, so he had complied and had given a statement which was untruthful in part. To the contrary, Hughes testified that he had been promised nothing in exchange for accusing plaintiff. However, in serving his court-martial sentence of six months at hard labor he was given office work, passes, and permission to watch television and attend movies with his wife, concessions not usually accorded prisoners. (See paragraph 6 of the January 18, 1962, Advice of the Staff Judge Advocate to the Trial Counsel which describes the lenient treatment accorded Hughes in confinement. This was not before the court-martial, but it was necessarily known to Trial Counsel at the time.) On July 14, 1961, testified Staff Sergeant Klein, Hughes told him that he had cleaned up on the black market, and that "if this thing ever breaks, I'll drop a lot of people in the soup." Plaintiff testified that on July 18, 1961, Hughes told him that Captain Miller was selling whiskey through a first sergeant. When plaintiff told him he would have to prove it or go see Captain Miller about it, Hughes became white in the face.

12. Black-market sale to Cox. Hughes testified that in early April 1961 he had sold for plaintiff, as a favor and without compensation, certain alcoholic beverages and cigarettes to one Cox, a British civilian, and turned over the proceeds to plaintiff. Plaintiff denied this. These facts related to Specification 8 of Charge II, of which plaintiff was found not guilty.

13. First trip to Southend. Hughes testified that on or about the evening of June 9, 1961, he and plaintiff drove

in Hughes' car to Southend, England, with 140 boxes of cigars placed on or under the back seat, sold them to an unknown purchaser for £2 per box, divided the money between them, and returned home.[1] At his own court-martial trial on November 2, 1961, and in a written statement he had given Captain Miller, Hughes had said the trip in question was in May 1961, an error which he attributed to a lapse of memory. In his testimony plaintiff denied the facts stated by Hughes, and said that he had taken only one trip to Southend, which was in June 1961 as related in finding 14, *infra*. Specification 1 of Charge I and Specifications 2 and 3 of Charge II in the case against plaintiff are the only Specifications relating to an offense involving 140 boxes of cigars allegedly committed jointly by Hughes and plaintiff, while Hughes testified as to two black-marketing trips to Southend with plaintiff, each trip allegedly involving the transportation to, and sale of 140 boxes of cigars in, Southend. It is fair to assume that the Specifications refer to only one trip to Southend, and that therefore any testimony by Hughes concerning the earlier of the two alleged trips was not the subject of any specific charges and so was not included in the Specifications of which plaintiff was found guilty. In his testimony plaintiff denied knowledge of the earlier trip to Southend to which Hughes had testified, and there was no evidence of the first trip corroborating Hughes' account of it.

14. Second trip to Southend. The sharpest conflict in the entire court-martial trial, and the crux of plaintiff's conviction, concerned a trip to Southend on June 17, 1961, by Hughes and his wife and two dogs in their car, jointly with plaintiff, his wife, their four children and Master Sergeant Herron in plaintiff's car. The issue is whether plaintiff transported in his car 140 boxes of cigars and 20 transistor radios to Southend on this occasion and, with Hughes, sold them to an unnamed British civilian

[1] In affidavits attached to the plaintiff's Correction Board application, Airmen Linville and Jones aver that plaintiff was on duty the night of June 9, 1961, thus placing him elsewhere than Southend. These affidavits were before the Correction Board but not before the court-martial.

and divided the proceeds. Hughes and his wife testified that this occurred, and plaintiff's testimony that it did not is supported by the testimony of his wife and Sergeant Herron. Sergeant Herron, who was flown to England from his station in Texas for the sole purpose of testifying in plaintiff's behalf at the trial, stated that no cigars or transistor radios were in plaintiff's car (including the trunk which he had occasion to inspect) at any time during the course of the trip to Southend, and at no time did plaintiff (who was in his presence throughout the trip) engage in the sale of such merchandise to others. Plaintiff and his wife testified and described the trip in detail, denying that plaintiff transported or sold the merchandise as stated by Hughes. Mrs. Hughes testified concerning the trip to Southend, but she had no personal knowledge corroborating Hughes' testimony that plaintiff transported merchandise to Southend and sold it there in conjunction with Hughes to a British civilian. Mrs. Hughes did testify that Hughes, plaintiff, and Sergeant Herron absented themselves for more than half an hour at Southend from their wives and the children, that the Juhl car was gone and that when they returned the plaintiff had some British money (how much she did not know) and gave some money to his wife. Contrary to the Law Officer's directions, Hughes coached Mrs. Hughes about her testimony, the morning she took the stand. The facts concerning the trip to Southend as related by Hughes constituted the necessary basis of Specification 1 of Charge I and Specifications 2 and 3 of Charge II of which plaintiff was found guilty by the court-martial. The testimony of Hughes, an alleged accomplice of plaintiff, was the sole evidence upon which plaintiff was convicted of the stated Specifications, and Hughes' testimony was not corroborated.

15. Trip to Airman Squire's home in Brandon. Hughes testified that on some date between July 14 and 17, 1961, he and plaintiff drove to Airman Squire's home in Brandon in a car borrowed from Airman Baldadian, taking with them 63 boxes of cigars obtained by them from the Air Force Exchange, of which 23 boxes belonged to Hughes and the balance to plaintiff. In plaintiff's Article

32b investigation hearing on December 13, 1961, Hughes testified that the cigars were definitely on the back seat of the car, while at plaintiff's trial Squire testified they were in the trunk compartment. Hughes said that Squire was to sell the cigars for them, and that upon arriving at Squire's home he and Squire unloaded the cigars from the car and stored them in Squire's home while plaintiff kept watch for them. Squire testified that, pursuant to arrangements made with Hughes but not with plaintiff, Hughes brought 50 boxes of cigars to his house for him to sell. Plaintiff (said Squire) accompanied Hughes, but while Squire and Hughes unloaded the cigars from the car to the house, plaintiff remained in the yard talking with Mrs. Squire, from which point he could see neither the unloading operation nor the road. Squire said that plaintiff's name was not mentioned with respect to the deal with Hughes, that plaintiff was not serving as a lookout during the unloading procedures, and that he had no arrangements whatsoever to share the sale proceeds with plaintiff (as he did with Hughes). Squire said that he later threw the boxes of cigars away when he became apprehensive over being caught with them in the course of the investigation being conducted. In his testimony on this subject the plaintiff admitted visiting Squire's home accompanied by Hughes, but denied any knowledge of transporting cigars or cigarettes to Squire. Airman Baldadian, who was convicted of black-marketing by a British court on January 8, 1962, testified that he had never loaned his car to Hughes except sometimes at lunch, and that he did not lend his car to Hughes on the date or dates when Hughes testified he had borrowed it to drive to Squire's home, but left some question as to whether he might not have done so. The charges involving the transportation of 50 boxes of cigars to Squire's home are contained in Specification 7 of Charge II, of which Specification plaintiff was found guilty by the court-martial. His guilt necessarily depended for its sole support on the testimony of Hughes, an alleged accomplice, whose testimony was denied by plaintiff and was not corroborated.

16. Joint sales by Airman Shields and plaintiff. Specifications 5 and 6 of Charge II allege a sale by Airman

Shields and plaintiff on July 15, 1961, of 64 cartons of cigarettes and 12 boxes of cigars to an unauthorized person, and the transfer by them on July 14, 1961, of eight bottles of gin to an unauthorized person. As in the case of Specification 1 of Charge I and Specifications 2 and 3 of Charge II, involving the alleged possession by plaintiff in unreasonable amounts and sale by him and Hughes to an unauthorized person at Southend of 140 boxes of cigars obtained from the Air Force Exchange, the evidence of plaintiff's guilt (under Specifications 5 and 6 of Charge II) consisted solely of the uncorroborated testimony of an alleged accomplice (in this instance, Airman Shields) of tarnished character and a self-admitted liar except that the plaintiff was found not guilty as to Specifications 5 and 6 of Charge II, while he was found guilty as to Specification 1 of Charge I and Specifications 2 and 3 of Charge II. In view of the acquittal of plaintiff under Specifications 5 and 6 of Charge II, it is not necessary to analyze the evidence adduced at the court-martial in support of the Specifications.

17. Irregular acquisition of cigars and cigarettes.

a. Specification 4 of Charge II accused plaintiff of wrongfully acquiring cigars and cigarettes from the Air Force Exchange in an irregular manner. The evidence as to this charge at the court-martial trial consisted of the testimony of Airmen Hughes and Shields, and that of three discharged female employees of the Air Force Exchange at Lakenheath (Morley, Fletcher, and Coleman), countered by the testimony of plaintiff and his wife.

b. Airman Hughes testified that in April or May 1961 he introduced plaintiff (denied by plaintiff) to Miss Morley, then a British employee of the Exchange, for the purpose of permitting plaintiff to purchase cigarettes without a ration card. Ration cards were issued to authorized personnel at the base permitting them to purchase limited quantities of tobacco items, liquor, and certain other merchandise. Hughes stated that, from the end of April to sometime in July 1961 he and plaintiff went to the Exchange about three times a week to purchase items, mostly cigars, of which they would purchase from one to ten boxes at a time. They would go there about 3:00 to 3:30 in the afternoon, when Miss Morley would relieve the

regular employee at the tobacco counter. Airman Shields testified that he visited the Exchange with Hughes and plaintiff on one occasion, personally purchased four cartons of cigarettes above his ration allowance by having his ration card overpunched (i.e., a punch hole overlapping a previous punch hole for the same allotment period), then went to a waiting car, where plaintiff handed him two or three boxes of cigars which he placed on the back seat. He did not testify that he had observed plaintiff purchase the cigars, or that the cigars purchased by plaintiff were in excess of his ration allowance or were purchased without a ration card, or that plaintiff had observed Shields or Hughes make their purchases without or in excess of their ration cards.

c. Miss Morley was an employee of the Air Force Exchange, and at tea breaks served as relief salesclerk at the tobacco counter. Under date of July 18, 1961, she signed a written statement at the urging of a British constable in which she referred to sales of cigars and cigarettes to several airmen, including plaintiff, which statement she testified was not completely true and that it was signed by her under the implied threat that she would lose her job if she did not make it. She lost her job anyway. While the statement was attached to the court-martial record marked for identification as Prosecution Exhibit 1, it was neither offered in evidence by the Trial Counsel nor admitted in evidence by the court. It therefore has no standing as part of the evidence against plaintiff. Miss Morley testified that she had never sold tobacco items to plaintiff in any unusually large quantities. She did sell tobacco products at times to plaintiff on ration cards issued to his wife or his friends, but it was (she said) a usual practice for authorized persons to buy tobacco rations for their authorized friends by presenting their friends' cards. Plaintiff and his wife together were allowed ten cartons of cigarettes at a time (said Miss Morley), and once or twice plaintiff purchased eight cartons. She never sold tobacco products to plaintiff without punching his ration card or those of his wife or friends in such cases.

d. Mrs. Fletcher was an employee of the Air Force Exchange at Lakenheath assigned as salesclerk to the to-

bacco counter. Under date of July 18, 1961, she signed a written statement at the instance of a British constable in which she referred to sales of tobacco products to airmen, including plaintiff, which statement she testified was signed by her under the threat that she would lose her job if she refused. She lost her job anyway. While the statement was attached to the court-martial record marked for identification as Prosecution Exhibit 8, it was neither offered in evidence by Trial Counsel nor admitted in evidence by the court. It therefore has no standing as part of the evidence against plaintiff. Mrs. Fletcher testified that plaintiff purchased cigarettes for himself and his wife, but never more than their combined ration allowance. Occasionally plaintiff would purchase cigarettes for friends on their ration cards, which was a common practice. She never sold cigarettes to plaintiff without punching his ration card, nor overpunched ration cards to allow persons to buy in excess of their ration allowance. She sold large quantities of cigarettes to Airman Hughes, but not to plaintiff.

e. Mrs. Coleman (formerly Mrs. Lock), was a British employee of the Air Force Exchange at Lakenheath, where she was supervisory salesclerk at the radio and record shop. Her testimony related exclusively to the sale of transistor radios to plaintiff. The only charge against plaintiff involving transistor radios was Specification 1 of Charge II, of which plaintiff was found not guilty. Specification 4 of Charge II accuses plaintiff of wrongfully acquiring cartons of cigarettes and boxes of cigars from the Exchange in an irregular manner, but does not refer to the acquisition of transistor radios. Thus the testimony of Mrs. Coleman is not relevant to any charges of which plaintiff was found guilty.

f. In summary, the sole evidence of plaintiff's guilt of purchasing cigars and cigarettes *for himself* under Specification 4 of Charge II was the testimony of Airman Hughes, whose testimony if true established plaintiff as his accomplice in violation of Air Force regulations governing the acquisition of rationed items from the Air Force Exchange. The testimony of Hughes in this connection was not corroborated. That of Airman Shields

established only that on one occasion plaintiff had handed him two or three boxes of cigars, without further direct evidence as to how he acquired them or whether that quantity was within his ration allowance. Shields' testimony was not corroborated, and did not serve to corroborate Hughes' testimony on the relevant charge, nor Hughes his. The testimony of Miss Morley and Mrs. Fletcher denied that plaintiff had purchased tobacco items in excess of his ration card allowances for himself or those authorized persons for whom he bought them using their ration cards, but did establish that at most plaintiff purchased cigarettes and cigars for his friends as an accomodation to them, using their ration cards, and that this was a common, accepted practice. The testimony of Mrs. Coleman related to plaintiff's purchase of radios, and was completely irrelevant to the issue raised by Specification 4 of Charge II. Whether the applicable regulation prohibited plaintiff from purchasing rationed items from the Exchange for his authorized friends, using their ration cards and as an accomodation to them, depends on construction. The regulation was not physically before the court-martial but presumably judicial notice was taken of it. It appears on pages 2 and 3 of the January 18, 1962, Advice of the Staff Judge Advocate to Trial Counsel, and is in evidence as Defendant's Exhibit 1.

18. Plaintiff's dereliction of duty.

a. **General.** The sole remaining charge of which plaintiff was found guilty was Specification 9 of Charge II, alleging plaintiff's dereliction of duty from April 1 to July 18, 1961, in knowing that Air Policemen under his supervision were engaged in black-marketing activities and willfully failing to apprehend them or to report the violators to his superior officers pursuant to his duty. Plaintiff's conviction under this Specification necessarily depended exclusively on the testimony of Captain Kenton D. Miller, and Airmen Hughes and Shields, for no other prosecution witnesses testified in support of the Specification, no documentary evidence supporting the Specification was admitted in evidence at the court-martial trial, and the testimony of plaintiff and his witnesses refuted the accusations in the Specification. It thus becomes necessary to

analyze the testimony of Captain Miller and Airmen Hughes and Shields with respect to the Specification, as well as to cite from the record facts as to their credibility, veracity, character, and motivation.

b. **Captain Miller.** Captain Miller had been plaintiff's commanding officer in England for two years preceding the court-martial trial and was a close associate who held a high regard for plaintiff's ability, honesty, etc., until events starting in July 1961 caused him to change his mind. Early in July 1961 the OSI brought to his attention that about 49 enlisted men in his command were engaged in black-marketing activities, ten of them being under plaintiff's supervision. On or about July 18, 1961, Hughes orally informed Captain Miller of 29 men in the squadron whom he accused of black-market activities, including the plaintiff. Captain Miller interviewed about 60 men in the squadron, of whom only Airmen Hughes, Shields and Squire implicated plaintiff in black-marketing activities. Some others whom Captain Miller interviewed had suspicions of plaintiff, but no proof. This was the extent of Captain Miller's knowledge, all of it being hearsay based on statements to him by Airman Hughes, Shields and Squire. Squire testified at the trial but said nothing inculpating the plaintiff. Miller had, except for this hearsay, no information to show plaintiff had any guilty knowledge and the case therefore depends again on the testimony of the alleged accomplices only.

c. **Airman Hughes.** The testimony by Hughes at plaintiff's court-martial, relating to this specification, was substantially that already discussed, and its infirmity is the same as with respect to other specifications.

d. **Airman Shields.**

(1) **Veracity and character.** Shields admitted he had lied in his statements to OSI investigators, as to the amount of black market purchase money he received. He had testified at his own Article 32b investigation that he had *bought* eight bottles of gin from plaintiff to sell on the black-market, but at plaintiff's trial he said that he had sold the gin for plaintiff on the black-market and paid the plaintiff later. This transaction is one which figured in Specification 6 of Charge II in plaintiff's court-martial;

of which Specification plaintiff was found not guilty. Shields told the OSI investigators that plaintiff had given him a telephone number of a prospective purchaser of black-market merchandise in Southend, which plaintiff denied in his testimony. Sergeant Bryant testified that in the summer of 1961 Shields told him that "If I go to Molesworth [2] there will be a bunch going with me, including you." When Bryant replied that he had done nothing, Shields (per Bryant) replied: "No, but I'll think of something to tell them when I go down there.", and "I'll tell them anything to put anybody in a trick if it will get me out of it myself." Bryant also testified that Shields told him in November 1961 that he had gotten off with an Article 15 (two weeks extra duty and verbal reprimand) and, as to plaintiff: "After the b—— s—— I told those people, they've got enough to hang Juhl." Bryant reported this conversation to plaintiff. Shields denied that he told Bryant that he would tell anything on anybody to get out of it himself. Plaintiff testified that Shields told him on August 10, 1961, that he had made a false statement implicating plaintiff in black-marketing activities, and said "Here I am, one of the biggest floggers on the base, or was one. And I really dropped you in the you-know-what." Plaintiff also testified that on this occasion Shields told him that he had gotten off with a light punishment (Article 15) in exchange for making a statement against plaintiff, and that "Your name ain't worth a damn on this base any more. You used to have a pretty good position. I told enough b—— s—— on you to put you—hang you." When plaintiff asked Shields whether he had been instructed by the legal office not to talk to him about the case, Shields is reported to have replied: "P—— on the legal office. I'll talk to anybody I want to." Shields admitted that he might have said to plaintiff, after getting a light punishment, that he had taken the easy way out and had made a statement implicating plaintiff in which "I really dropped you in the s——.", but does not remember having told plaintiff that he made the statement

[2] Consolidated Confinement Center at RAF Station Molesworth, the standard site for serving sentences of confinement at hard labor.

implicating plaintiff in order to avoid a threatened long sentence, although he may have told plaintiff that it would be to his (Shield's) advantage to make such a statement. Airman Jones testified that in November 1961 Shields told him that he could tell more lies about plaintiff and be believed, because plaintiff's word did not mean anything on the base any longer. Jones also testified that Shields told him that, in spite of being the biggest black-marketer on the base, he had been given just a pat on the back and told he had been a naughty boy [figuratively speaking] by way of punishment (reprimand and two weeks extra duty), and that Captain Miller and Sergeant Collier had threatened him (Shields) with a six-month sentence and a bad conduct discharge if he did not make a statement against plaintiff. Hughes, who was a good friend of Shields, testified that he had received stolen property from Shields (cf. finding 11a *supra*). Shields denied that the OSI agent had threatened that his wife (apparently a foreign national) would not be allowed to accompany him to the United States if he refused to implicate plaintiff. Plaintiff testified that Shields was angry at him for his refusal to fix a traffic ticket, and this was corroborated by Airman Jones.

(2) As previously stated, Shields was the sole and uncorroborated witness against plaintiff in connection with Specifications 5 and 6 of Charge II (relating to an alleged sale by Shields and plaintiff on July 15, 1961, of cigars and cigarettes and the transfer by them on July 14, 1961, of eight bottles of gin to unauthorized persons), of which Specifications plaintiff was found not guilty. Shields' testimony in support of these alleged offenses had no relationship to any other Specifications of which the plaintiff was found guilty and did not corroborate any evidence of plaintiff's guilt as to such offenses. Moreover, Shields was not under plaintiff's direct supervision in the Squadron, which was one of the express elements of the offense charged insofar as plaintiff's knowledge of Shields' black-marketing activities is concerned. Shields was a purported accomplice.

(3) The testimony of Shields was "self-contradictory." The triers of fact must have found it improbable in view of their acquittal of plaintiff on the specifications, other

than 9, in which Shields rather than Hughes was the purported accomplice. Insofar as plaintiff's conviction on specification 9 rested on any transactions testified to by Shields, it was made on the uncorroborated testimony of a purported accomplice which was both "self-contradictory" and "improbable."

III—Correction Board

19. Application to Correction Board.

a. Under date of October 27, 1962, plaintiff filed an application with the Air Force Board for Correction of Military Records seeking a complete reversal of his court-martial sentence (and presumably his conviction). Plaintiff stated on the form application that he did not desire to have witnesses appear in person in support of the application. Attached to the application were, in addition to plaintiff's affidavit, the affidavits of eighteen persons having direct or indirect knowledge of the facts, and the unsworn statements of two other such persons. If the contents of the affidavits are true, they are incompatible with plaintiff's guilt of the charges of which he was convicted, and shed particular light on the veracity and motivation of Hughes, the chief prosecution witness without whose testimony plaintiff could not have been convicted. They would justify close scrutiny by the Correction Board of the court-martial proceeding.

b. On March 5, 1963, the Director of Military Justice of the Office of The Judge Advocate General recommended to the Correction Board that the relief sought by plaintiff be denied because he had failed to establish the asserted errors and injustice. In its one and one-third pages the letter does not discuss the evidence or the law, but primarily rejects the affidavits accompanying plaintiff's application as being "executed by persons who were either directly or indirectly interested in the outcome of the trial." This generalization is without basis in many instances, as the affidavits themselves reveal.

c. On September 17, 1963, the Correction Board sent the plaintiff the following form letter rejecting his claim:

> Reference is made to your request for correction of your military records under the provisions of Section 1552, Title 10, United States Code (70A Stat. 116).
>
> The administrative regulations and procedures established by the Secretary of the Air Force for the guidance of the Board provides that an application may be denied where the applicant has not submitted sufficient evidence to establish a showing of probable error or injustice in the case.
>
> I regret to advise you that a careful consideration by the Board of your military record, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. Therefore, in the absence of additional material evidence tending to show the commission of an error or injustice, no further action on your application is contemplated.

d. Plaintiff, through a staff attorney of the American Legion, applied to the Correction Board for a reconsideration on December 3, 1964. On December 14, 1964, the Correction Board sent the following letter to plaintiff's counsel rejecting his request:

> As requested in your letter of December 3, 1964, the Board has again reviewed the case of Kenneth N. Juhl, AF 693 2438.
>
> After careful consideration, the Board determined that a change in the prior decision or a formal hearing is not warranted.

e. The foregoing constitutes the entire Correction Board record furnished the court. It is presumed to be complete. It does not contain a report by a Correction Board examiner advising the Correction Board as to the factual and legal aspects of the claim and making recommendations for its disposition, and it is assumed that no such report was prepared. At pretrial conference on March 30, 1966, the parties stipulated that the Correction Board considered Defendant's Exhibits 1 and 2, which are respectively (1) the Advice of Staff Judge Advocate to Trial Counsel dated January 18, 1962, and (2) a 68-page transcript of testimony taken in connection with the Ar-

ticle 32b investigation of plaintiff as referred to in finding 6, *supra*. It cannot be determined how much, if any, consideration the Correction Board gave to the contents of Defendant's Exhibits 1 and 2 described above. There is no stipulation or clear indication that the Correction Board considered or had physical possession of Joint Exhibits 1 and 3, which are, respectively, (1) a 64-page extract from the record of court-martial proceedings before and after the trial itself, and (3) the court-martial trial transcript of over 500 pages, including testimony, arguments, instructions, and exhibits, both exhibits being vital to any bona fide review of plaintiff's claims. What consideration the Correction Board gave to Joint Exhibits 1 and 3, if any, is not known, since the only clue is the statement in the Board's form letter to plaintiff (paragraph c of this finding) that it had given "careful consideration" to plaintiff's military record. It is not indicated that any effort was made by the Board to communicate with the individuals whose affidavits were attached to plaintiff's application.

f. As stated in the preceding paragraph, one of the court-martial documents which was available to the Correction Board for its consideration was the 68-page transcript of testimony in the Article 32b investigation of plaintiff as a preliminary to his court-martial. Attached to this transcript as "Article 32 Exhibit 2" was a photostatic copy of an Air Force Exchange Ration Card issued to plaintiff covering the period July through December 1961. The original of this ration card was taken from the plaintiff at the time of his arrest on July 18, 1961. The copy of the ration card appears to have been overpunched (i.e., more than one overlapping punchmark in each of four tobacco allotment periods during July 1961), giving rise to the inference at the Article 32b Investigation that plaintiff had purchased more tobacco than he was authorized to have. This exhibit was deliberately not offered by the prosecution at the plaintiff's court-martial trial because Trial Counsel felt it would not be admissible due to the illegal circumstances of its acquisition by the OSI. Since the transcript of testimony of the Article 32b proceeding, together with the ration card and considerable

testimony thereon, was stipulated to have been considered by the Correction Board, but had not been offered to the court-martial because of the prospective objections to its admissibility, the plaintiff contends here that the Correction Board's consideration of such illegally procured and tainted evidence deprives plaintiff of his constitutional rights. To offset the possible prejudice inherent in the document, the parties stipulated that if the plaintiff were to testify he would say that some of the punchers used at the Air Force Exchange on ration cards were old and frequently would not cut clean, making it necessary for the clerk to overpunch to get the paper out of the hole, as evidenced by Plaintiff's Exhibit 2 containing a ration card issued to plaintiff for the period January through June 1962, showing samples of incomplete actual punches for tobacco allotment purchases in June 1962, a period while plaintiff was still in confinement.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover on his claim and judgment is entered to that effect, with the determination of the amount of recovery to be reserved for further proceedings under Rule 47(c).

Exhibit "A"

153. CREDIBILITY OF WITNESSES; IMPEACHMENT OF WITNESSES.—*a.* CREDIBILITY OF WITNESSES.—The credibility of a witness is his worthiness of belief, and may be determined by the acuteness of his powers of observation, the accuracy and retentiveness of his memory, his general manner in giving evidence, his relation to the matter in issue, his appearance and deportment, his friendships and prejudices, and his character as to truth and veracity, by comparison of his testimony with other statements made by him and with the testimony of others, and by other evidence bearing upon his veracity. See in this connection 149*b*(1) (Cross-examination).

The court may ordinarily draw its own conclusions as to the credibility of a witness and attach such weight to his evidence as his credibility may warrant. However, there are cases in which the court would be justified in attaching no weight at all to the testimony of a witness, or in which the court would not be warranted in accepting certain testimony as sufficient to establish the guilt of an accused. For example, a conviction cannot be sustained solely on the self-contradictory testimony of a particular witness, even though motive to commit the offense is shown, if the contradiction is not adequately explained by the witness in his testimony. Also a conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense, or upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable. The uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution.

In general, a person gains no corroboration merely because he repeats a statement a number of times. Hence, a witness ordinarily may not be corroborated by showing that he made statements consistent with his testimony. But this is only a general rule, and there are some situations in which such statements, having a real evidential value, are admissible. If the testimony of a witness has been attacked on the ground that it was due to an influence created by a matter which came into existence after the happening of the event to which such testimony relates, evidence of his statements or conduct, consistent with his testimony, made or occurring before the creation of that influence should ordinarily be received. For example, if a witness is impeached on the ground of bias due to a quarrel with the accused, the fact that before the date of the quarrel he made an assertion similar to his present testimony tends to show that his present testimony is not due to bias. If his impeachment is sought on the ground of collusion or corruption, consistent statements made prior to the imputed or admitted collusion or corruption may have such evidential value as to make them admissible, and if his testimony is attacked on the

ground that he made an inconsistent statement or on the ground that such testimony was a fabrication of recent date, evidence that he had made a consistent statement before there was a motive to misrepresent, and before any imputed or admitted inconsistent statement, may be received.

If a witness testifies as to the identity of the accused as the person who committed, or did not commit, the offense in question, such testimony may be corroborated, even though the credibility of the witness has not been directly attacked, by showing that the witness made a similar identification with respect to the accused on a previous occasion. In such a case the identifying witness himself and any person who has observed the previous identification may testify concerning it. See as to corroboration of the victim in sexual offenses, 142*c* (Fresh complaint). See also 139*b* (Illustrations of hearsay rule).

* * * *

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, Judges, except that JONES, Senior Judge, participated in No. 388-62 in place of COLLINS, Judge, who took no part therein, and SKELTON and NICHOLS, Judges, took no part in No. 337-64.

ORDER

These cases come before the court on motions for reconsideration, rehearing, to alter judgment, for new trial, and for further relief under Rules 68 and 69 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 19th day of January 1968, that said motions be and the same are denied as follows:

368-62 Albert C. Brown, Jr., etc. Plaintiffs' motion for reconsideration.

388-62 Charlson Realty Company. Defendant's motion for rehearing.

14-63 Eastern Rotorcraft Corporation, etc. Motion by third party defendants for re-hearing to alter the judgment and motion by defendant for rehearing to alter the judgment.

285-64 Southern Arizona Bank and Trust Company, etc. Plaintiffs' motion for rehearing.

337-64 Frank Dvorsky. Plaintiff's motion, filed November 6, 1967, for a new trial under Rule 69.

353-65 Kenneth N. Juhl. Defendant's motion for reconsideration.

260-66 Percy A. Ellis. Plaintiff's motion for rehearing pursuant to Rule 68.

BY THE COURT

/s/ Wilson Cowen
WILSON COWEN
Chief Judge.

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